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Administrative Conference of the United States

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Administrative Conference of the United States

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ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-8

NATIONAL COVERAGE POLICY UNDER THE MEDICARE PROGRAM: PROBLEMS AND PROPOSALS FOR CHANGE

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I. INTRODUCTION

The Medicare program, a federal entitlement program providing health insurance for the aged, disabled and certain individuals with end-stage renal disease,[1] serves over 30 million Americans and is the sole source of health insurance for most of these individuals.[2] The program has two components: (1) Part A hospital insurance, which pays for hospital and related services including skilled nursing and home health care;[3] and (2) Part B supplementary medical insurance, which pays for physician and other services provided chiefly on an outpatient basis.[4] The Health Care Financing Administration (HCFA) within the Department of Health and Human Services (HHS) administers the Medicare program.[5]

The policies and procedures by which the Medicare program makes decisions about whether to cover certain items and procedures used in the medical care of beneficiaries under the Medicare program have become controversial in recent years. On April 29, 1987, pursuant to the settlement of a lawsuit,[6] HCFA issued a notice in the Federal Register publishing for the first time its procedures for making national coverage determinations pertaining to medical technologies and procedures.[7] In this notice, HCFA stated its intention to promulgate a rule establishing procedures and criteria for making such national coverage determinations.

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[1] All individuals who are eligible for Social Security old age and disability insurance programs are eligible for Part A and Part B of the Medicare program. Social Security Act §§ 1811, 1836, 42 U.S.C. §§ 1395c, 1395o (1982 & Supp. 1985). Eligibility for these programs is also extended to nearly all other elderly not covered under the Social Security program and certain other individuals with End Stage Renal Disease. Social Security Act §§ 1811, 1818, & 1836, 42 U.S.C. §§ 1395c, 1395i, & 1395o (1982 & Supp. 1985). Enrollment in both Part A and Part B of the Medicare program is voluntary. Social Security Act § 1803, 42 U.S.C. § 1395b (1982 & Supp. 1985). There is no cost to enroll in Part A, which is financed by the Social Security Wage Tax. Social Security Act § 1817, 42 U.S.C. § 1395i (1982 & Supp. 1985). However, to enroll in Part B, the eligible individual must pay monthly premiums. Social Security Act §§ 1811, 1839, 1840, 42 U.S.C. §§ 1395c, 1395r, & 1395s (1982 & Supp. 1985).

[2] Waldo, Levit & Lazenby, National Health Expenditures, 1985, Health Care Fin. Rev. (Fall 1986), at 5.

[3] Social Security Act §§ 1811-1818, 42 U.S.C. §§ 1395c-1395i (1982 & Supp. 1985).

[4] Social Security Act §§ 1831-1845, 42 U.S.C. §§ 1395j-1395w (1982 & Supp. 1985).

[5] The Department of Health and Human Services was created in 1980 out of the former Department of Health, Education and Welfare (HEW) when the Department of Education was created. Remarks at the signing of the bill creating the Department of Health and Human Resources, 1 Pub. Papers (1980-1981) 908 (May 14, 1980). The Health Care Financing Administration (HCFA) was created in 1977 when President Carter consolidated the Medicare program from the Social Security Administration and the Medicaid program from the Public Health Service, Dep't of Health, Educ. & Welfare Reorganization Order, 42 Fed. Reg. 13,262 (1977).

[6] Jameson v. Bowen, [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,534 (E.D. Cal. Feb. 15, 1985), motion to dismiss denied [1987-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 36,073 (E.D. Cal. Feb. 20, 1987) (Settlement Agreement and Release of Claims). See infra notes 232-234 and accompanying text.

The Administrative Conference of the United States has been concerned about the Medicare appeals system generally and in 1986 conducted a study and made recommendations on Medicare appeals.[8] The most controversial issues that emerged in that study were the problems with the process for making all types of coverage policy, including national coverage determinations regarding medical technologies and procedures. Regarding this particular process,[9] the Conference urged HHS to reform its procedures for making national coverage decisions and introduce "more openness and regularity" into the process.[10] In 1987, out of concern that the national coverage policymaking process continues to need reform, the Conference commissioned this study of procedures by which the HHS makes national coverage policy as well as the opportunities for administrative and judicial review of national coverage policy. The Administrative Conference has recently published a proposed recommendation for reforms in the national coverage policymaking process in the Federal Register.[11]

This study analyzes the process for making national coverage policy under the Medicare program from an administrative and constitutional law perspective and proposes recommendations for changes. Specifically, it addresses issues in two general areas: (1) promulgation and publication of national coverage policy, and (2) administrative and judicial review of national coverage policy. Regarding the first area, the study will address promulgation and publication of the procedures and criteria for making national coverage policy as well as specific national coverage policies. Regarding the second area, the study will look chiefly at issues posed by the Supreme Court's recent decision in Bowen v. Michigan Academy of Family Physicians[12] and by the Omnibus Budget Reconciliation Act of 1986, which expanded opportunities for administrative and judicial review of coverage disputes but imposed significant restrictions as well.[13]

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[7] Health Care Fin. Admin., Medicare Program, Procedures for Medical Services Coverage Decisions; Request for Comments, 52 Fed. Reg. 15,560 (Apr. 29, 1987) [hereinafter April 29th Notice].

[8] Admin. Conference of U.S., Recommendation 86-5: Medicare Appeals, 1 C.F.R. § 305.86-5 (1987); Kinney, The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint, 1 Admin. L. J. 1 (1987) (Kinney, The Medicare Appeals System for Coverage and Payment Disputes, 1986 ACUS 389).

[9] See infra notes 49-78 and accompanying text.

[10] Admin. Conference of U.S., Recommendation 86-5, Medicare Appeals, 1 C.F.R. § 305.86-5 (1987).

[11] Admin. Conference of the U.S., Draft Recommendation; Medicare Program; National Coverage Determinations, 52 Fed. Reg. 38,925 (1987).

[12] 476 U.S. 667 (1986). See infra note 294 and accompanying text.

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[13] Omnibus Budget Reconciliation Act § 9341 (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff). See infra note 125 and accompanying text.

II. BACKGROUND

A. The Current Medicare Coverage Policymaking Process

1. Statutory and Regulatory Definitions of Coverage

Coverage is a concept that defines the amount and type of health care services for which the Medicare program will pay and determines the conditions upon which the Medicare program will pay for the services. The Medicare statute defines the scope of benefits[14] broadly and defines in general terms the benefits for which the Medicare program will pay.[15] Specifically, Social Security Act § 1862(a)(1)(A) provides that the Medicare program will pay for health care services, not expressly excluded from coverage by statute, that are "reasonable and necessary" for the "diagnosis and treatment of disease or injury or to improve the functioning of a malformed body member."[16]

The basic statutory provision regarding coverage has remained unchanged since 1965.[17] Congress did not elaborate on this statutory language in the legislative history.[18] Rather the Senate and House Committee reports only give examples of reasonable and necessary services:

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[14] Social Security Act § 1812, 42 U.S.C. § 1395d (1982 & Supp. 1985) (Part A); Social Security Act § 1832, 42 U.S.C. § 1395k (1982 & Supp. 1985) (Part B).

[15] Social Security Act § 1861, 42 U.S.C. § 1395v (1982 & Supp. 1985).

[16] Social Security Act § 1861(a)(1)(A), 42 U.S.C. § 1395u(a)(1)(A) (1982 & Supp. 1985).

[17] Social Security Act § 1862(a)(1)(A), 42 U.S.C. § 1395y(a)(1)(A) (1982 & Supp. 1985). See Hogan & Hartson, Memorandum to Lewin and Associates, Inc. Re: The Medicare Technology Assessment and Coverage Process, reprinted in II Lewin & Associates, Inc., A Forward Plan For Medicare Coverage and Technology Assessment 12-20(1987) [hereinafter Hogan & Hartson Memorandum].

Since 1965, Congress has extensively amended § 1862 outlining coverage exclusions but has never further defined the terms "reasonable and necessary" in § 1862(a)(1)(A). Most amendments to § 1862 pertain to coverage or exclusion of specific items or impose coverage conditions on specific items. Some of the most important amendments include: coverage of podiatry and optometry services in 1967 (Social Security Amendments of 1967 § 127(b) (codified as amended at Social Security Act § 1962(a)(7) & (13), 42 U.S.C. § 1395y(a)(7) & (13) (1982 & Supp. 1985)); coverage of dental services in 1980 (Omnibus Reconciliation Act of 1980 § 936 (codified at Social Security Act § 1862(a)(12), 42 U.S.C. § 1395y(a)(12) (1982 & Supp. 1985)) and coverage of hospice services in 1982 (Tax Equity and Fiscal Responsibility Act of 1982 § 122 (codified as amended at Social Security Act § 1862(a)(6), 42 U.S.C. § 1395y(a)(1)(C) (1982 & Supp. 1985)).

Also, in 1981, Congress required mandated coverage review of paid claims for home health services to monitor compliance with medical necessity requirements and directed HHS to develop "utilization guidelines" for home health services as a means to contain escalating costs in home health service. Omnibus Budget Reconciliation Act of 1981 § 2152(a) (codified as amended at Social Security Act § 1862(f), 42 U.S.C. § 1395y(f) (1982 & Supp. 1985)).

> For example, the bill would bar payment for health items or services that are not reasonable and necessary for the treatment of illness or injury or to improve the functioning of a malformed body member. Thus, payment could be made for the rental of a special hospital bed to be used by the patient in his home only if it was a reasonable and necessary part of a sick person's treatment. Similarly, such potential personal comfort items and services as massages and health lamp treatments would only be covered where they contribute meaningfully to the treatment of an illness or injury or the functioning of a malformed body member.[19]

Some statements in the legislative history regarding hospital benefits under Part A, however, clearly indicate that Congress contemplated covering and paying for new technologies and had drafted the statute broadly enough to assure such coverage in future years:

> The reasonable cost of service ordinarily provided to inpatients by hospitals . . ., including new services and techniques as they are adopted in the future, would be paid for.[20]

HHS never promulgated regulations elaborating further the statutory coverage criteria of "reasonable and necessary" in § 1862(a)(1)(A). Rather the applicable regulations[21] simply restate the statutory language.[22] However, HCFA has defined the term "reasonable and necessary" in the context of delineating when various types of Medicare benefits would be covered.

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[18] *See* *S. Rep. No*. 404, 89th Cong., 1st Sess. 27 (1965), *reprinted in* 1965 *U.S. Code Cong. & Admin. News* 1943, 1967-1968; *H.R. Rep. No*. 213, 89th Cong., 1st Sess. 41.

[19] *S. Rep. No*. 404, *supra* note 18, at 48, *reprinted in* 1965 *U.S. Code Cong. & Admin. News* 1943, 1989; *see also* *H.R. Rep. No*. 213, *supra* note 18, at 41 (containing an identical provision).

[20] *S. Rep. No*. 404, *supra* note 18, at 27, *reprinted in* *U.S. Code Cong. & Admin. News* 1943, 1967-1968; *see also* *H.R. Rep. No*. 213, *supra* note 18, at 24 (containing a nearly identical provision).

[21] 42 C.F.R. §§ 405.310(k)-(m) (1986).

[22] In 1980, HCFA did circulate a proposed rule within HHS establishing procedures for making national coverage policy but HHS never published this proposed rule in the *Federal Register*. Mehlman, *Health Care Cost Containment and Medical Technology: A Critique of Waste Theory*, 36 *Case W. Res*. 778, 863 n. 344 (1986). *See* Memorandum from Howard Newman, Administrator of HCFA to the Secretary of HHS (Sept. 24, 1980) (proposed rule for criteria and procedures for

Regarding new or questionable medical technologies and procedures, the Social Security Administration, the predecessor of the HCFA, did interpret these terms in a 1977 program instruction to fiscal intermediaries and carriers, stating that the Medicare program did not, as a matter of policy, pay for a medical item or service considered to be "experimental or investigational" since they "have not generally been accepted by the professional medical community as effective and proven treatments for the conditions for which they are being used in particular cases."[23] More recently, HCFA stated that it interprets the phrase "reasonable and necessary" to mean that an item or procedure is safe and efficacious as well as widely accepted by the medical profession.[24]

HCFA has also defined the statutory terms of "reasonable and necessary" for other types of services and in other contexts. One example of such a definition of this statutory language is the manual provision defining coverage of physical therapy services provided as part of home health benefits. The Medicare Home Health Manual and the Medicare Intermediary Manual state that physical therapy services provided on a home basis are not "reasonable and necessary" unless the therapy can be expected to lead to significant improvement in the patient's condition.[25]

2. The Different Types of Medicare Coverage Policy

It is important to appreciate that there are different types of Medicare coverage policy. Specifically, there are three categories of coverage policy: (1) coverage policy of Medicare contractors; (2) national coverage determinations for medical technologies and procedures; and (3) other types of national coverage policies that are not identified as coverage policy specifically but that define the amount, scope and conditions of Medicare benefits.

Most Medicare coverage policy is made by Medicare contractors, i.e., fiscal intermediaries, carriers and peer review organizations, which process claims for the Medicare program and perform other functions described in greater detail below.[26] But in certain cases, HCFA makes and publishes coverage policy on questions of national concern. According to the April 29th Notice, any policy

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medical services coverage decisions under Medicare).

[23] Part A Intermediary Letter No. 77-4; Part B Intermediary Letter, No. 77-5 (Jan. 1977), reprinted in [1976-77 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 28,152. One federal district court, in Mayfield v. Secretary, upheld a decision to deny Medicare coverage for use of hypobaric oxygen therapy to treat senility which was based on the criterion that the procedure was experimental. See Hogan & Hartson Memorandum, supra note 17, at 16.

[24] April 29th Notice, 52 Fed. Reg. 15,560 (1987), at 15,561-15,562.

[25] Health Care Fin. Admin., Medicare Home Health Manual § 205.1(b)-(c) (1987); Health Care Fin. Admin., Medicare Intermediary Manual § 3118.1(b)-(c) (1987).

[26] See infra notes 79-99 and accompanying text.

affecting coverage that HCFA publishes in the *Medicare Coverage Issues Manual*,[27] HCFA rulings or other HCFA manuals[28] constitutes a national coverage determination.[29]

Coverage Policy of Medicare Contractors. Medicare contractors handle several hundred million claims annually of which a small proportion raise coverage questions.[30] In most cases, the coverage question involves a determination of whether an item or service was medically necessary for the individual or was furnished in an appropriate manner or setting.[31] In these cases, the Medicare contractor makes the coverage decision and follows any applicable national coverage policies.[32] In the case of hospital services, the fiscal intermediary or carrier is also bound by any decision of the PRO regarding medical necessity of an item or service.[33]

Medicare contractors make coverage decisions in individual cases and often will formulate a coverage policy to address similar claims in the future. Medicare contractors have considerable latitude in making coverage policies that apply to the Medicare claims within their jurisdiction even on questions involving new technologies.[34] Basically, Medicare contractors have authority to make any decision on coverage not specifically controlled by a national coverage policy or assigned by HCFA to peer review organizations (PROs).[35]

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[27] *Health Care Fin. Admin.*, *Medicare Coverage Issues Manual* (1987) *reprinted in* 4 Medicare & Medicaid Guide (CCH) ¶¶ 27,201-27,221.

[28] *See infra* notes 80-83 and accompanying text.

[29] April 29th Notice, 52 Fed. Reg. 15,561 (1987).

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *See* Demlo, Hammonds, Kuder, Rogers & Lynch *Decision-Making by Medicare Contractors for Coverage of Medicare Technologies*, *reprinted in* *Office of Technology Assessment*, *Medical Technology and the Costs of the Medicare Program*, at Appendix E, 196-197 (1982); I *Lewin & Associates, Inc.*, *A Forward Plan For Medicare Coverage and Technology Assessment*, at A.8 [hereinafter *Lewin & Associates, Inc.*]; *see generally* *Macro Systems, Inc.*, *Technology Assessment and Coverage Decision-Making in the Department of Health and Human Services* (1984).

An interesting example of this latitude is the fact the fiscal intermediary for northern California was paying for heart transplants in the late 1970s and it was an inquiry from this fiscal intermediary that precipitated HHS's examination of whether to cover heart transplants in 1980. Knox, *Heart Transplants: To Pay or Not to Pay*, 209 *Science* 570, 571 (1980).

[35] *See infra* notes 96-99 and accompanying text.

Medicare contractors, with HCFA's encouragement and, in the case of home health benefits by statutory mandate,[36] often use computerized "screens" to identify claims for more conventional services in which the items or services provided exceed preset norms as to durations, frequency or intensity of the utilization of such services.[37] These screens are adopted for a wide variety of benefits primarily for physicians and suppliers services under Part B and home health and skilled nursing services under Part A. Little is known about how Medicare contractors use these screens, although in some cases it appears that Medicare contractors automatically deny claims for items or services exceeding the screens.[38]

National Coverage Determinations for Medical Technologies and Procedures. Since the inception of the Medicare program, HCFA and its predecessor, the Social Security Administration, have made approximately 200 national coverage determinations regarding medical technologies and procedures, although the number has been increasing in recent years.[39] These national coverage determinations are published in the *Medicare Coverage Issues Manual*[40] and sometimes as HCFA rulings or notices in the *Federal Register*. The *Medicare Coverage Issues Manual* also includes the "Screening List for Durable Medical Equipment" specifying various items of medical equipment that are covered or excluded under the Medicare program, and recently a list of covered ambulatory surgical procedures.[41]

Other Types of National Coverage Policy. Many national coverage policies are contained in HCFA manuals other than *Medicare Coverage Issues Manual* and are not specifically identified as coverage policies. Indeed, as has been demonstrated in the cases challenging Medicare coverage policy,[42] there are provisions in nearly all Medicare program manuals that influence the coverage of Medicare benefits. With respect to hospital services, many of these types of coverage policies define the conditions of payment or responsibilities of PROs in monitoring the utilization of inpatient hospital services provided Medicare beneficiaries.[43]

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[36] Social Security Act § 1862(f); 42 U.S.C. § 1395y(f) (1982 & Supp. 1985); *see supra* note 17.

[37] *See* *Government Accounting Office*, *Improving Medicare and Medicaid Systems to Control Payments for Unnecessary Physicians' Services* (No. HRD-83-16, Feb. 8, 1983); *see generally* *Medicare Appeals Provisions*, *Hearings Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985) [hereinafter *Hearings on Medicare Appeal Provisions*]; *Issues Related to Medicare Contracting: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. (1986).

[38] *Id.*; *see* *Hearings on Medicare Appeal Provisions*, *supra* note 37.

[39] *Lewin & Associates, Inc.*, *supra* note 34, at 3.6 & 3.18. (This source indicates that requests of HCFA from Medicare contractors, manufacturers and other quarters to make national coverage policy for specific items or procedures has been increasing by ten percent annually.)

[40] *See* *Health Care Fin. Admin.*, *Medicare Coverage Issues Manual* (1987), *reprinted in* 4 Medicare & Medicaid Guide (CCH) ¶ 27,201.

[41] Health Care Fin. Admin., Medicare Program, Final Notice, List of Covered Surgical Procedures for Ambulatory Surgical Centers, 52 Fed. Reg. 13,176 (1987), *corrected*, 52 Fed. Reg. 17,678 (1987), *reprinted in* 4 Medicare & Medicaid Guide (CCH) ¶ 27,211; *see also* *Health Care Fin. Admin.*, *Medicare Carriers Manual* § 2100.1 (1987) (outlining criteria for coverage of durable medical equipment).

One example of such coverage policies is the criteria for making coverage decisions regarding durable medical equipment contained in the Medicare Carriers Manual.[44] Specifically, covered durable medical equipment is "primarily and customarily used to serve a medical purpose" and "generally is not useful to a person in the absence of an illness or injury."[45] Another example is the policy delineating the conditions upon which physical therapy services provided as part of home health care will be considered reasonable and necessary.[46]

It should be pointed out that, in the April 29th Notice, HCFA has defined national coverage determinations as including any coverage policy contained in "other HCFA manuals."[47] Thus, arguably, HCFA intends to have the coverage policymaking process described in the April 29th Notice apply to all coverage policy in addition to that concerning medical technologies and procedures. Further, this expansive definition suggests that HCFA intends that such coverage policy would be subject to the provisions limiting administrative and judicial review of national coverage determinations in the Omnibus Budget Reconciliation Act of 1986 discussed below.[48]

3. Procedures for Making National Coverage Policy

National Coverage Determinations for Medical Technologies and Procedures. The current procedures for making national coverage determinations for medical technologies and procedures are relatively straightforward and have been described in the April 29th Notice.[49] The process for making these national coverage determinations is driven almost exclusively by the claims review process and thus is primarily reactive.[50] If a Medicare contractor has a question about whether a new procedure or technology should be covered, it may refer the question to the HCFA regional or national office.[51] In some cases, the HCFA regional office or national office may make an informal judgment which is then applied by the Medicare contractor.[52] In other cases, HCFA may decide to make a national coverage determination that applies in all future similar cases nationwide.[53]

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[42] See infra notes 292-322 and accompanying text.

[43] See infra notes 97-99 and accompanying text.

[44] Health Care Fin. Admin., Medicare Carriers Manual § 2100.1 (1987). The Social Security Act defines durable medical equipment as basically medical equipment such as wheelchairs, hospital beds and other similar devices of a permanent nature used in the patient's home. Social Security Act § 1861(n), 42 U.S.C. § 1395x(n) (1982 & Supp. 1985).

[45] Health Care Fin. Admin., Medicare Carriers Manual § 2100.1(C) & (D) (1987).

[46] See supra note 25 and accompanying text.

[47] April 29th Notice, 52 Fed. Reg. 15,561 (1987).

[48] See infra notes 125-134 and accompanying text.

[49] April 29th Notice, 52 Fed. Reg. 15,560 (1987); see also Lewin & Associates, Inc., supra note 34, at 3.1-3.42; Ruby, Banta & Burns, Medicare Coverage, Medicare Costs, and Medical Technology, 10 J. Health Pol., Pol'y. & L.

The Special Coverage Issues Branch of the Division of Coverage Policy within the Bureau of Eligibility, Reimbursement and Coverage (BERC) in HCFA is responsible for making national coverage determinations regarding medical technologies and procedures and durable medical equipment. In most cases, BERC will simply make the national coverage determination if BERC staff feel that no significant medical question is involved and if the question is whether it is otherwise appropriate or authorized by statute to cover a questionable item or procedure.[54]

If BERC believes that a medical question is presented, then the question is referred to the HCFA Physicians Panel. This panel is an informal group comprised chiefly of physicians who work for HCFA. It was formed in 1980 to handle coverage questions of a medical nature "in-house" so that HCFA would not have to seek outside medical consultation from the Public Health Services (PHS) or other sources.[55] The Director of the PHS Office of Health Technology Assessment sits on this panel. The panel meets about once every six weeks, in private and without a published agenda, to make coverage policy.[56] HCFA estimates that the panel considers between 20 to 30 national coverage questions annually.[57] The

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141 (1985).

[50] See also Lewin & Associates, Inc., supra note 34; Macro Systems, Inc., supra note 34; Demlo, Hammons, Kuder, Rogers & Lynch, supra note 34.

[51] April 29th Notice, 52 Fed. Reg. 15,561 (1987); see also Lewin & Associates, Inc. supra note 34; Macro Systems, Inc., supra note 34; Demlo, Hammond, Kuder, Roberts & Lynch, supra note 34.

[52] See supra notes 34-35 and accompanying text.

[53] April 29th Notice, 52 Fed. Reg. 15,561 (1987).

[54] See Lewin & Associates, Inc., supra note 34, at 3.8.

[55] Lewin & Associates, Inc. supra note 34, at 3.8.

[56] Telephone interview with Barton McCann, M.D., Chief, Special Coverage Issues Branch, Office of Coverage Policy, Bureau of Eligibility, Reimbursement and Coverage, Health Care Financing Administration, May 3, 1987.

[57] April 29th Notice, 52 Fed. Reg. 15,560 (1987); see also Ruby, Burns & Banta, supra note 49.

panel makes a recommendation to BERC as to coverage of the disputed item or service or whether to refer the coverage question to PHS for further medical evaluation.

The Office of Health Technology Assessment (OHTA) in the National Center for Health Services Research and Health Care Technology Assessment coordinates the statutorily-mandated assistance of PHS to HCFA in making coverage policy.[58] The specific mandate of OHTA is to make recommendations as to whether specific technologies should be paid for by federal health insurance programs.[59] The criteria by which OHTA must assess technology is broader than that accorded HCFA in the Social Security Act[60] and includes the "safety, efficacy, and effectiveness" of the technology and, "as appropriate, the cost-effectiveness and the appropriate uses of the technology."[61] HCFA rarely asks OHTA to analyze cost-effectiveness of a new medical technology.[62]

The authorizing legislation for OHTA requires that it consult with the National Institutes of Health (NIH), the Food and Drug Administration (FDA) and other federal agencies in its technology assessment activities.[63] Clearly, the most important federal technology assessment activities, described in greater detail below, are the FDA's medical device approval procedures[64] and the NIH Consensus Conferences on medical treatment modalities.[65] If the NIH has considered an item or procedure at issue in a coverage question, OHTA generally adopts the NIH position.[66] OHTA is less deferential to FDA approval of a new medical device pursuant to the Medical Device Amendments of 1976[67] -- a situation, as will be discussed below, generating considerable criticism from health equipment manufacturers.[68]

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[58] Health Promotion and Disease Prevention Amendments of 1984 § 5 (codified as amended at Public Health Service Act § 305(e), 42 U.S.C. § 242c(e) (1982 & Supp. 1985).

The statutory mandate for OHTA's technology assessment activities in the Medicare coverage policymaking process is:

> (e)(1) The Center shall advise the Secretary respecting health care technology issues and make recommendations with respect to whether specific health care technologies should be reimbursable under federally financed health programs.
> (2) In making recommendations respecting health care technologies, the Center shall consider the safety, efficacy, and effectiveness, and, as appropriate, the cost-effectiveness and appropriate uses of the technology.
> (3) In carrying out its responsibilities under this section respecting health care technologies, the Center shall cooperate and consult with the National Institutes of Health, the Food and Drug Administration, and any other interested Federal departments or agencies.

Public Health Service Act §§ 305(e)(1)-(3), 42 U.S.C. §§ 242c(e)(1)-(3) (1982 & Supp. 1985).

[59] Id; see Dep't of Health & Human Services, Pub. Health Serv., Nat'l Center for Health Services Research, Public Health Service Procedures for Evaluating Health Care Technologies for Purposes of Medicare Coverage (Jul. 1983).

[60] See Social Security Act § 1862(a)(1)(A), 42 U.S.C. § 1395y(a)(1)(A) (1982 & Supp. 1985).

[61] Public Health Service Act § 305(e)(2), 42 U.S.C. § 242c(e)(2) (1982 & Supp. 1985).

[62] Lewin & Associates, Inc., supra note 34, at 3.9.

BERC makes requests to OHTA in two basic forms: (1) an informal inquiry; or (2) a request for a full assessment as to safety and effectiveness.[69] For an informal inquiry, OHTA reviews the medical literature and consults with medical specialty groups and professional organizations to address specific questions of the HCFA Physicians Panel. OHTA is uncomfortable with this process as it generally does not know how HCFA and the HCFA Physicians Panel use its advice in making coverage policy.[70]

A full assessment is a much more elaborate process. OHTA issues a notice in the Federal Register soliciting comments from interested parties. It also solicits comments and consults extensively with other governmental agencies as well as medical specialty groups and professional organizations about the technology in question. Further, it obtains information from commercial and industrial groups and specific manufacturers and reviews published medical and scientific literature. Indeed, OHTA relies heavily on the private technology assessment activities of numerous private organizations[71] and confers informally and often with these organizations about coverage questions regarding new or questionable technologies.[72] OHTA collects data for its assessments from outside sources and does not engage in primary data collection efforts.[73] OHTA does not disclose its findings or decisions about the technology assessment in question until after HCFA has published its coverage policy pertaining to the technology.[74]

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[63] Public Health Service Act § 305(e)(3), 42 U.S.C. § 242c(e)(3) (1982 & Supp. 1985).

[64] See infra notes 158-166 and accompanying text.

[65] See supra notes 167-169 and accompanying text.

[66] Interview with Enrique Carter, M.D., Director, Office of Health Technology Assessment, National Center for Health Services Research/Health Care Technology Assessment, Public Health Service, Jul. 8, 1987; Interview with Kathy Buto, Deputy Director, Bureau of Eligibility, Reimbursement and Coverage, Health Care Financing Administration, Jul. 7, 1987.

[67] Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at the Federal Food, Drug and Cosmetic Act §§ 513-521, 21 U.S.C. §§ 301, 360c-k (1982 & Supp. 1985). See infra notes 158-166 and accompanying text.

[68] See infra notes 254-256 and accompanying text.

[69] April 29th Notice, 52 Fed. Reg. 15,562 (1987). Between 1981 and 1986, the number of informal inquiries was between 70 and 80 while the number of formal requests was 125. Letter of Vincent A. Bucci, Vice President for Regulatory Affairs, Shiley Infusaid, Inc. to Eleanor D. Kinney (Nov. 30, 1987).

[70] Interview with Enrique Carter, M.D., supra note 66.

In addition to preparing extensive reports on its assessments,[75] OHTA makes a recommendation on coverage.[76] HCFA, however, makes the final decision on a coverage question after reviewing the OHTA recommendation.[77] HCFA may also reevaluate an item or service that is already excluded or covered under the Medicare program (1) if OHTA previously suggested reevaluation of the item or service; (2) if OHTA learns of recent research advances; (3) if an item or service becomes obsolete; or (4) if interested parties submit evidence demonstrating that a reassessment of the coverage determination is warranted.[78]

Other Types of National Coverage Policy. The procedures for making other types of national coverage policy that is not published in the *Medicare Coverage Issues Manual* are somewhat more obscure. The Office of Coverage Policy within BERC makes many of these policies as do the offices within BERC responsible for reimbursement policy. The Health Standards and Quality Bureau makes most national coverage policy related to the PRO program. There are not established procedures for making this type of coverage policy, although HCFA sometimes consults with interested parties -- chiefly providers -- on an informal basis.

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[71] *See infra* notes 185-189 and accompanying text.

[72] Interview with Enrique Carter, M.D., *supra* note 66.

[73] *See Lewin & Associates, Inc.*, *supra* note 34, at 3.9 & 3.28-3.29.

[74] *Id.*, at 3.9.

[75] *See, e.g.*, *Dep't Health & Human Services, Pub. Health Service, Nat'l Center for Health Services Research*, *Liver Transplantation* (1983); *Dep't Health & Human Services, Pub. Health Service, Nat'l Center for Health Services Research*, *Continuous Positive Airway Pressure for the Treatment of Obstetrical Sleep Apnea in Adults* (1986); *Dep't Health & Human Services, Pub. Health Service, Nat'l Center for Health Services Research*, *Anglechilk Anti-Reflux Prosthesis* (1986); *Dep't Health & Human Services, Pub. Health Service, Nat'l Center for Health Services Research*, *Single Photon Absorptiometry for Measuring Bone Mineral Density* (1986); *Dep't Health & Human Services, Pub. Health Service, Nat'l Center for Health Services Research*, *Full Automated Ambulatory Blood Pressure Monitoring of Hypertension* (1986).

[76] April 29th Notice, 52 Fed. Reg. 15,562 (1987).

[77] *Id.*

[78] *Id.*

B. Background on the Medicare Program and the American Health Care System

1. The Medicare Program

The Medicare program is a unique federal entitlement program with several important features that profoundly influence the Medicare coverage policymaking process and the current problems with this process. These key features of the Medicare program are the unique manner in which the program is administered, the way in which the Medicare program pays for covered benefits and the appeal procedures that are available to beneficiaries to appeal adverse coverage decisions regarding their medical care.

Administration. HCFA contracts with private organizations to administer the claims of beneficiaries and the payment of providers under the Medicare program.[79] For Part A, these organizations are called "fiscal intermediaries;" for Part B they are referred to as "carriers." Collectively these organizations, along with peer review organizations ("PROs") described below, are called Medicare contractors. These organizations administer the payment of claims and determine coverage of the treatment rendered to individual Medicare beneficiaries.

HHS retains policy control over both the administration and the review of claims and has increased this control over the years. To provide the requisite guidance to fiscal intermediaries, carriers and PROs as well as to hospitals and other institutional providers, HCFA uses a massive compendium of multi-volume manuals, with one manual for each of the organizations and providers involved in the administration and provision of health care benefits to Medicare beneficiaries.[80] In addition, HCFA publishes a specific manual on Medicare coverage issues.[81] These manuals and other program directives are not promulgated pursuant to the notice-and-comment rulemaking requirements of the

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[79] Social Security Act §§ 1816, 1842, 42 U.S.C. §§ 1395h, 1395u (1982 & Supp. 1985).

[80] These health insurance manuals that are published by HCFA include the following: Hospital Manual (HIM-10); Home Health Agency Manual (HIM-11); Skilled Nursing Facility Manual (HIM-12); Medicare Intermediaries Manual (HIM-13); Medicare Carriers Manual (HIM-14); Provider Reimbursement Manual (HIM-15); Medicare Renal Dialysis Facility Manual (HIM-29); and PRO Manual. HCFA constantly updates these manuals through "transmittals." For directives without ongoing effect, HCFA uses program memoranda, 1 Medicare & Medicaid Guide (CCH) (1987).

HCFA gives each fiscal intermediary and carrier copies of these health insurance manuals and distributes manuals Medicare contractors and some other organizations as needed for their work. HCFA does not make these manuals generally available to the public or even to providers because of their size, cost and need to be updated constantly. 42 C.F.R § 401.112 (1986). Portions of these manuals that affect the public are distributed to local Social Security Administration offices (Id. at § 401.130-.132).

[81] Health Care Fin. Admin., Medicare Coverage Issues Manual (1987), reprinted in 4 Medicare & Medicaid Guide (CCH) ¶¶ 27,201-27,221.

This manual contains approximately 200 coverage policies pertaining chiefly to new or controversial medical technologies or procedures. The manual also contains a list of durable medical equipment for which HCFA has formulated a national coverage policy. "Screening List for Durable Medical Equipment," reprinted in Id. at ¶ 27,211.

Administrative Procedure Act (APA).[82] Since September 1981, HCFA has also published rulings, generally administrative or judicial decisions, to clarify points of statutory and regulatory interpretation.[83]

The unique administrative structure for the Medicare program delegates enormous responsibility to private individuals and organizations to make coverage and payment decisions regarding Medicare benefits for Medicare beneficiaries. Congress adopted this private approach to program administration for several reasons. One major reason was that the Department of Health, Education and Welfare (HEW) did not have the requisite expertise to administer a massive health insurance program involving review of millions of medical decisions regarding the medical care of individual beneficiaries. Private insurance companies and Blue Cross and Blue Shield Plans already possessed the needed expertise.[84]

A second major reason for this administrative approach was the fundamental tradition of physician dominance of decisionmaking in the treatment of individual patients.[85] Both because the diagnosis and treatment of disease is a highly technical affair and because under the laws of all states, in which the licensure of the health professions resides, physicians are required to obtain extensive education and training before they are qualified to practice, only physicians have the requisite knowledge and, for the most part, the legal authority to determine what services should be provided to specific patients.[86] State laws and hospital accreditation standards require that physicians oversee the diagnosis and treatment of disease in hospitals.[87] Consistent with these legal requirements, the Medicare statute requires that physicians certify that the services provided to individual beneficiaries are reasonable and necessary for the treatment of an illness or injury.[88]

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[82] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982 & Supp. 1985).

[83] 42 C.F.R. § 401.108 (1987).

[84] H.R. Rep. No. 213, supra note 18, at 45-47 (1965); S. Rep. No. 404, supra note 18 at 52-54; reprinted in 1965 U. S. Code Cong. & Admin. News 1943, 1992-1995; see S. Law, Blue Cross - What Went Wrong? 31-50 (2d. ed. 1976).

[85] P. Starr, The Social Transformation of American Medicine 18-21 (1982).

[86] See F. Grad & N. Marti, Physicians' Licensure & Discipline 54, 60-61 (1979).

[87] See Id.; Joint Comm'n on Accreditation of Hospitals, Accreditation Manual for Hospitals 109-127 (1987) (Medical Staff Standards).

The Medicare statute provides that hospitals that are accredited by the Joint Commission on Accreditation of Hospitals are deemed to comply with the Medicare program's condition of participation for providers under the Medicare program. Social Security Act § 1865, 42 U.S.C. § 1395bb (1982 & Supp. 1985). See generally Jost, The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest, 24 B.C. L. Rev. 835 (1983).

[88] Social Security Act §§ 1814(a), 1835(a), 42 U.S.C. §§ 1395g(a), 1395l(a) (1982 & Supp. 1985). The Medicare statute defines a physician broadly to include osteopathic physicians, optometrists, podiatrists, dentists and even chiropractors practicing within the scope of their license. Social Security Act

Physicians and hospitals opposed federal administration of the Medicare program because of fears of government interference in the practice of medicine.[89] Indeed, providers were successful in preventing passage of the Medicare legislation for several years and only gave their support when congressional committees and HEW introduced the concept of private administration into the proposed legislation.[90] The medical profession in particular was adamant about the concept of private administration and Congress's accommodation of the medical profession is reflected in the legislative history.[91]

The other critical consideration in designing the administrative structure of the Medicare program -- indeed to ensure its enactment -- was to assure complete autonomy to the physician both in the individual practice of medicine and in setting policies that would affect the practice of medicine generally. Congress and HEW adopted the principle of physician autonomy in the practice of medicine with respect to Medicare patients, and Congress specifically stated this principle as a general policy in the first section of the Medicare statute:

> Nothing in this title shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the

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§ 1861(r), 42 U.S.C. § 1395x(r) (1982 & Supp. 1985).

[89] *See* *J. Feder*, *Medicare: The Politics of Federal Hospital Insurance* 1 (1977); *H. Somers & A. Somers*, *Medicare and the Hospitals: Issues and Prospects*, 10 (1967); Wolkstein, *Medicare 1971: Changing Attitudes and Changing Legislation*, 35 *J. L. & Contemp. Probs*. 697, 698-699 (1970); *Twenty Years of Medicare and Medicaid*, *Health Care Fin. Rev*., 1985 Annual Supp. at 118, 121-123 (statement of James H. Sammons, M.D., President, American Medical Association) (statement of Bernard R. Tresnowski, President of Blue Cross and Blue Shield Association) [hereinafter *Twenty Years of Medicare and Medicaid*].

[90] Wolkstein, *supra* note 89; *S. Law*, *supra* note 89, at 32.

[91] For example, the Senate Finance Committee report states:

> The committee's bill provides a considerable role for the participation of private organizations in the administration of both the hospital insurance plan and the supplementary plan.
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> * * *
>
> The committee believes that medical benefits under the supplementary plan (Part B) should be administered by the private sector. Private insurers, group health plans, and voluntary medical insurance plans have great experience in reimbursing physicians.

S. Rep. No. 404, *supra* note 18, at 52, 53, *reprinted in* 1965 *U.S. Code Cong. & Admin. News* 1943, 1992-1994. *See also* *H.R. Rep. No*. 213, *supra* note 18, at 42-43.

> administration or operation of any such institution, agency, or person.[92]

In designing the Medicare program, Congress and HEW were also concerned about controlling the costs of the program and ensuring that Medicare beneficiaries received only those services that were medically necessary. Because of the policy principle of physician autonomy in the care of Medicare beneficiaries, and because only physicians had the requisite expertise to make decisions about medical necessity, Congress placed the regulatory function for accomplishing this objective in the control of physicians. Specifically, Congress required that hospitals and skilled nursing facilities establish utilization review committees, staffed by physicians, to review the admissions, durations of stay and professional services provided to Medicare beneficiaries according to the criteria of medical necessity and the most efficient use of available health facilities and services.[93] There was no utilization review requirement for Part B. The history of utilization review under the Medicare program is important because the basic failure of the medical profession to assume responsibility for effective utilization review put tremendous pressure on HHS and its fiscal intermediaries and carriers to use coverage policy as a means of controlling excess utilization of services by defining acceptable utilization through coverage policy.[94]

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[92] Social Security Amendments of 1965 § 102(a) (codified at Social Security Act § 1801, 42 U.S.C. § 1395 (1982 & Supp. 1985).

The Senate Finance Committee Report reiterates this policy:

> The bill specifically prohibits the Federal Government from exercising supervision or control over the practice of medicine, the manner in which medical services are provided, and the administration or operation of medical facilities. . . . The responsibility for, and the control of, the care of the beneficiaries rests with the hospitals, extended care facilities, the beneficiaries' physicians, etc.

S. Rep. No. 404, supra note 18, at 24, reprinted in 1965 U.S. Code Cong. & Admin. News 1943, 1965.

The Senate Finance Committee elaborated further:

> The committee's bill provides that the physician is to be the key figure in determining utilization of health services--and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments, and determine the length of stay.

S. Rep. No. 404, supra note 18, at 46, reprinted in 1965 U.S. Code Cong. & Admin. News; see also H.R. Rep. No. 213, supra note 18, at 40-41.

[93] Social Security Amendments of 1965 § 102 (codified as amended at Social Security Act §§ 1814(a)(6), 1861(k), 42 U.S.C. §§ 1395f(a)(6), 1395x(k) (1982 & Supp. 1985).

[94] See J. Feder, supra note 89, at 42; S. Law, supra note 84, at 122; see also Havighurst & Blumstein, Coping with Quality/Cost Trade-Offs in Medical Care: The Role of PSROs, 70 Nw. U. L. Rev. 6 (1975).

In 1972, Congress concluded that the utilization review had not been effective, enacted the Professional Standards Review Program to establish outside organizations to conduct utilization review for health care facilities serving Medicare beneficiaries.[95] Following the anti-regulatory lead of the newly-elected Reagan Administration, however, Congress repealed this program in 1981.[96]

One year later, Congress enacted the Peer Review Improvement Act requiring HCFA to contract with PROs -- private, physician-dominated organizations -- to determine whether hospital services provided to Medicare beneficiaries are medically necessary and provided in an appropriate setting.[97] In 1983, Congress assigned PROs important monitoring functions under the prospective payment system for hospitals including review of admissions, discharges and selected categories of cases as well as the responsibility to deny coverage for inpatient hospital services in individual cases where services were neither medically necessary nor provided in an appropriate setting.[98] PROs also handle all beneficiary requests for reconsideration of adverse coverage decisions for inpatient hospital services.[99]

Payment Methodologies. Originally, Congress and HEW left the determination of price and payment method for services furnished Medicare beneficiaries to providers and insurance companies. In the Social Security Amendments of 1965, Congress stated only that it would pay institutional providers the "reasonable cost"[100] and physicians the "reasonable charge"[101] of covered services. By statute, these costs and charges were to be calculated according to methods that health insurance companies already used.[102] This halcyon state of affairs lasted only a few years as the cost and volume of services provided to Medicare beneficiaries exploded.[103]

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[95] Social Security Amendments of 1972 § 249F(b) (codified as amended at Social Security Act § 1151 et seq.) repealed Peer Review Improvement Act of 1982, Title III, Subtitle C of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 324, 382 (1982). See A. Gosfield, PSROs: The Law and the Health Consumer (1975).

[96] Omnibus Budget Reconciliation Act of 1981 § 2111. See Professional Standards Review Organization (PSRO) Program: Hearings Before the Subcomm. on Oversight and the Subcomm. on Health of the House Ways and Means Comm., 97th Cong., 1st Sess. 25-27 (1981) (statement of Carolyne Davis, Administrator of HCFA); Proposed Phaseout of PSROs and Utilization Review Requirements: Hearings Before the Subcomm. on Health of the Senate Comm. on Finance, 97th Cong., 1st Sess 15 (1981) (statement of Carolyne Davis, Administrator of HCFA).

[97] Peer Review Improvement Act of 1982, Title I, Subtitle C of the Tax Equity and Fiscal Responsibility Act of 1982 § 143 (codified as amended at Social Security Act §§ 1152-1162, 42 U.S.C. §§ 1320c to 1320c-12 (1982 & Supp. 1985)).

[98] Social Security Amendments of 1983 § 602(f)(1) (to be codified as amended at Social Security Act § 1866(a)(1)(F), 42 U.S.C. § 1395cc(a)(1)(F). See H.R. Rep. No. 47, 98th Cong., 1st Sess. 197, reprinted in 1983 U.S. Code Cong. & Admin. News 143, 487.

[99] See infra note 116 and accompanying text.

[100] Social Security Amendments of 1965 § 102(a) (codified as amended at Social Security Act §§ 1861(v), 1871, 42 U.S.C. §§ 1395x(v)(1) (1982 & Supp. 1985)).

HEW recognized almost immediately that the costs of the Medicare program would greatly exceed initial projections.[104] Over the following years, total Medicare expenditures rose from $4.6 billion in 1967 to $62.9 billion in 1984.[105] This development helped fuel the extraordinary inflation in health system costs reflected in part by the increase in percentage of the gross national product devoted to health care from approximately 6 percent in 1965 to 10.7 percent in 1985.[106]

Since 1971, Congress, with input from HHS, has enacted and continues to consider major changes in the methods for paying providers under the Medicare program. A complete history of these reforms is beyond the scope of this analysis, but some key reforms are noteworthy because of their implications for the Medicare coverage policymaking process. In the Social Security Amendments of

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[101] Social Security Amendments of 1965, § 102(a) (codified as amended at Social Security Act § 1842(b)(3)(F), 42 U.S.C. § 1395u(b)(3)(f) (1982 & Supp. 1985)).

[102] Social Security Amendments of 1965 § 102(a) (codified as amended at Social Security Act §§ 1842(b)(3)(F), 1861(v), 42 U.S.C. §§ 1395v(b)(3)(F), 1395x(v)(1) (1982 & Supp. 1985)). See S. Rep. No. 404, 89th Cong., 1st Sess. 8 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 1943, 1949; H.Rep. No. 213, 89th Cong. 1st Sess. 37-38. See also J. Feder, supra note 89, at 2.

[103] See Proposed Medicare Reimbursement Formula: Hearings Before The Senate Comm. on Finance, 89th Cong., 2d Sess. (1966); Staff of Senate Comm. on Finance, Medicare and Medicaid: Problems, Issues, and Alternatives, 91st Cong., 1st Sess. 53, 140-43 (Comm Print 1970); Wolkstein, supra note 89; Davis, Hospital Costs and the Medicare Program, 36 Social Security Bull. 18 (1973); M. Feldstein & A. Taylor, The Rapid Rise of Hospital Costs (1977); M. Zubkoff, I. Raskin & R. Hanft, Hospital Cost Containment (1978).

[104] Reimbursement Guidelines for Medicare: Hearing Before the Senate Comm. on Finance, 89th Cong., 2d Sess. (1966); Staff of Senate Comm. on Finance, 91st Cong., 1st Sess. Medicare and Medicaid: Problems, Issues, and Alternatives 53, 140-43 (Comm. Print 1970).

[105] Gornick, Greenberg, Eggers & Dobson, Twenty Years of Medicare and Medicaid: Covered Populations, Use of Benefits, and Program Expenditures, Health Care Fin. Rev., 1985 Annual Supp., at 42.

During this period, Part A expenditures rose from $3.4 billion to $43.3 billion and Part B expenditures rose from $1.2 billion to $19.7 billion. Id. at 43.

[106] National Health Expenditures, 1985, supra note 2, at 1; see supra note 2 and accompanying text.

1983, Congress established the prospective payment system for hospitals.[107] This system pays hospitals a fixed price, based on diagnosis, for each Medicare case irrespective of costs incurred, and contains strong incentives for hospitals to treat Medicare beneficiaries in a cost effective manner -- hospitals may retain savings but are at risk for costs exceeding the price per case.[108] Congress, also with input from HHS, is currently considering major reforms of payment methodologies for physicians and suppliers under Part B of the Medicare program.[109] All of the proposed reforms would depart from the current practice of paying the reasonable charge for a particular service[110] and contain incentives for physicians to provide care in a more cost efficient manner.

Under these payment reforms, coverage remains an important issue because the coverage of costly new medical technologies and the items and services used in the care of patients will be critical factors in determining payment rates under any formula.[111] Indeed, the prospective payment system has already changed the way in which hospitals view the acquisition of new medical technology to one of more cautious consideration of the impact the technology will have on the hospitals' financial performance.[112] In fact, Senator David Durenberger of Minnesota was so concerned that hospitals would be constrained by the prospective payment system prices from providing new life-saving technologies in certain cases that he introduced a bill to authorize coverage of and payment for such technologies outside the prospective payment system.[113]

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[107] Social Security Amendments of 1983, Pub. L. No. 98-21 §§ 601-607, 97 Stat. 149, (codified as amended at Social Security Act § 1886, 42 U.S.C. § 1395ww (1982 & Supp. 1985)).

[108] H.R. Rep. No. 25, 98th Cong., 1st Sess. 132 (1983), reprinted in 1983 U.S. Code Cong. & Admin. News 143, 351; Sec'y of the Dep't. of Health & Human Services, Report to Congress on Hospital Prospective Payment for Medicare 101-110 (1982), see generally Hospital Prospective Payment System: Hearings Before the Subcomm. on Health of the Senate Comm. on Finance, 98th Cong., 1st Sess. (1983); Medicare Hospital Prospective Payment System: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means, 98th Cong., 1st Sess. (1983).

[109] Proposals to Modify Medicare's Physician Payment System, Hearing Before the Subcomm. on Health of the Senate Comm. on Finance, 99th Cong., 2d Sess. (1986); Medicare Reimbursement for Physicians Services: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means, 99th Cong., 2d Sess. (1981); Office of Technology Assessment, Payment for Physician Services: Strategies for Medicare (1986); Physician Payment Review Comm'n, Medicare Physician Payment: An Agenda for Reform (1987).

[110] Social Security Act § 1842, 42 U.S.C. § 1395u (1982 & Supp. 1985).

[111] See Lewin & Associates, Inc., supra note 34, at 2.1, 4.1-4.20.

[112] See Anderson & Stenberg, To Buy or Not To Buy: Technology Acquisition under Prospective Payment, 311 New Eng. J. Med. 182 (1984); Garrison & Wilensky, Cost Containment and Incentives for Technology, 5 Health Aff. 46 (1986); Ball, Prospective Payment: Implications for Medical Technology, 100 Annals of Internal Med. 606 (1984); see also Merrill, Will Payment Control Technology Diffusion?, Hosp., July 5, 1987, at 46.

Appeals Procedures. The Medicare statute does authorize administrative and judicial review for beneficiaries to challenge adverse decisions regarding coverage of and payment for their Medicare benefits.[114] Specifically, beneficiaries of skilled nursing and home health services under Part A are entitled to administrative review before an administrative law judge (ALJ) within the Social Security Administration for claims over $100 and judicial review of claims exceeding $1000.[115] For inpatient hospital services under Part A, beneficiaries may obtain administrative review before an ALJ of PRO coverage decisions on the claims exceeding $200 and judicial review of claims exceeding $2000.[116]

Beneficiaries have only recently obtained the right to administrative and judicial review of coverage decisions regarding benefits under Part B. Previously, beneficiaries and providers who accepted assignment of the claim from the Medicare beneficiary[117] were only entitled to a hearing before the Medicare contractor.[118] After years of pressure from beneficiaries as well as from the American Bar Association and other groups, Congress concluded that the increased sophistication and monetary amount of Part B claims justified reconsideration of the preclusion.[119] In the Omnibus Budget Reconciliation Act of 1986 Congress established administrative and judicial review of Part B claims.[120]

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[113] S. 897, Health Care Innovation Act of 1987, 100th Cong., 1st Sess. (1987), see 133 Cong. Rec. S 4368 (Daily ed. Apr. 1, 1987) (Since introduction, Congress has taken no action on this bill).

[114] Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 & Supp. 1985). See Kinney, supra note 8.

[115] Social Security Act §§ 1869(b)(1)(C) & 1869(b)(2)(2), 42 U.S.C. § 1395ff(b)(1)(C), 1395ff(b)(2) (1982 & Supp. 1985).

[116] Social Security Act § 1155, 42 U.S.C. § 1320c-4 (1982 & Supp. 1985).

[117] Social Security Act § 1842(b)(3)(B)(1), 42 U.S.C. § 1395u(b)(3)(B)(1) (1982 & Supp. 1985).

[118] Social Security Amendments of 1965 § 102(a) (codified as amended at Social Security Act § 1842(c)(7), 42 U.S.C. § 1395u(c)(7) (1982 & Supp. 1985)).

Congress has significantly limited the ability of providers under Part A to challenge the coverage of Medicare benefits accorded individual beneficiaries. Specifically, the Provider Reimbursement Review Board, created in 1972 for administrative review of provider payment disputes,[121] explicitly provides that the PRRB has no jurisdiction to hear coverage issues.[122] Further, statutory provisions authorizing waiver of liability for non-covered services for both providers and beneficiaries only permit providers to challenge the validity of a Medicare contractor's decision on waiver of liability rather than the underlying coverage determination on which the waiver of liability decision was based.[123] HCFA had also prohibited providers from representing beneficiaries in coverage and other appeals but Congress overturned this policy in the Omnibus Budget Reconciliation Act of 1986.[124]

In the Omnibus Budget Reconciliation Act of 1986, Congress imposed significant limitations on the administrative and judicial review of national coverage determinations.[125] The law contains three critical provisions. First,

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[119] See, e.g., Medicare Appeals Provisions; Am. Bar Ass'n, Report and Recommendations from the American Bar Association House of Delegates (Aug. 6, 1980), reprinted in [1980 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,608.

However, it should be noted that the Supreme Court specifically upheld this statutory preclusion to administrative and judicial review of Part B claims. See U. S. v. Erika, Inc., 456 U.S. 201 (1982); cf., Schweiker v. McClure, 456 U.S. 188 (1982).

[120] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a)(2)(D), 100 Stat. 2038, (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff).

[121] Social Security Amendments of 1972, § 243(a) (codified as amended at Social Security Act § 1878, 42 U.S.C. § 1395oo (1982 & Supp. 1985)).

[122] Social Security Act § 1878(g), 42 U.S.C. § 1395oo(g) (1982 & Supp. 1985).

[123] Social Security Act § 1879(d), 42 U.S.C. § 1395pp(d) (1982 & Supp. 1985). See Hearings on Medicare Appeals Provisions, supra note 37, at 48-49.

[124] Omnibus Budget Reconciliation Act of 1986 § 9313(a) (to be codified at Social Security Act § 1869(b)(1), 42 U.S.C. §1395ff(b)(1)). See Home Health Care, Inc. v. Bowen, 639 F. Supp. 1124 (D.D.C. 1986) (invalidating the manual provisions prohibiting provider representation of beneficiaries on grounds that the provision was a legislative rule not promulgated under § 553 of the Administrative Procedure Act § 4, 5 U.S.C § 553 (1982 & Supp. 1985)).

[125] Omnibus Budget Reconciliation Act of 1986 § 9341a (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff). This statute provides in pertinent part:

> (3) Review of any national coverage determination under section

ALJs may not review the validity of national coverage determinations in administrative appeals.[126] Congress enacted this restriction to preclude ALJs from overturning national coverage determinations that had been made on the basis of medical evidence and expertise.[127] Second, the Act provides that national coverage policy cannot be held unlawful on grounds that HHS did not comply with Chapter 5 of the APA[128] or Social Security Act § 1871(b)[129] regarding publication in the *Federal Register* or providing the requisite opportunity for public comment.[130] Congress adopted this provision because it believed that current procedures for making national coverage determination offer sufficient opportunities for input from medical groups and the public without observing certain APA requirements:[131]

> Coverage determinations of national applicability could not be overturned solely on the grounds that they were not issued in accordance with the notice and comment procedures

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> 1862(a)(1) respecting whether or not a particular type or class of items or services is covered under this title shall be subject to the following limitations:
>
> (A) Such a determination shall not be reviewed by any administrative law judge.
>
> (B) Such a determination shall not be held unlawful or set aside on the ground that a requirement of chapter 5 of title 5, United States Code [Chapter 5 of the Administrative Procedure Act], or section 1871(b), relating to publication in the Federal Register or opportunity for public comment, was not satisfied.
>
> (C) In any case in which a court determines that the record is incomplete or otherwise lacks adequate information to support the validity of the determination, it shall remand the matter to the Secretary for additional proceedings to supplement the record and the court may not determine that an item or service is covered except upon review of the supplemental record.

Id.

[126] Omnibus Budget Reconciliation Act of 1986 § 9341(a)(1)(D) (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 & Supp. 1985).

[127] *H. R. Rep. No.* 727, 99th Cong., 2d Sess. 95, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 3607, 3685.

[128] Administrative Procedure Act, ch. 5, 5 U.S.C. §§ 500-504, 551-559, 571-576 (1982 & Supp. 1985).

[129] Social Security Act § 1871(b), 42 U.S.C. § 1395hh(b) (1982 & Supp. 1985).

[130] Omnibus Budget Reconciliation Act of 1986 § 9341(a)(1)(D) (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff).

[131] *See infra* note 534 and accompanying text.

> of the Administrative Procedure Act, as amended. The process used by the Secretary in making such determinations, including the role of the National Center for Health Services Research and Health Care Technology Assessment, is designed to assure consultation with the scientific and medical community and the general public. If that process is adhered to, the further procedure of publishing proposed and final regulations does not seem essential.[132]

Third, when a court determines that the record is incomplete or otherwise lacks adequate information to support the validity of a national coverage determination, the court must remand the case to HHS and may not determine that a national coverage determination is invalid except upon review of a supplemental record.[133] Here, Congress sought to preclude courts from reversing national coverage determinations made on the basis of medical evidence and expertise without according an opportunity to HHS to reconsider the national coverage determination.[134]

Some Observations. In sum, the architects of the Medicare program crafted a markedly different approach to defining the program benefit than other government benefit programs. Specifically, physicians and insurance companies have the major role both in developing coverage policy that defines specific benefits under the program and in determining what benefits should be accorded individual beneficiaries when they are ill or injured. Although HHS has assumed a more aggressive role in formulating coverage policy in recent years, it still relies heavily on insurance companies to make most coverage decisions and policy as well as relying on physicians for expertise in formulating specific coverage policies.[135] HHS has traditionally paid little attention to the process for making national coverage policy -- an understandable situation given the fact that the Medicare program was established before the so-called "Due Process Revolution" of the 1970s in which the Supreme Court acknowledged that recipients of government programs had a property or "entitlement" interest in the benefits of the program.[136]

Nevertheless, this unique approach to defining public entitlement interests of beneficiaries under the Medicare program is somewhat at odds with the current model of a government entitlement program. In other government programs, the entitlement interest is clearly defined by statute, regulations or other modality that is accessible to beneficiaries and that enables beneficiaries to predict the amount of benefits, once eligibility for benefits has been determined. Specifically, in a conventional entitlement program, the entitlement interest is defined by law, as are the conditions upon which the benefit will be conferred.

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[132] H.R. Rep. No. 1012, 99th Cong., 2d Sess. 350-351 (1986).

[133] Omnibus Budget Reconciliation Act of 1986 § 9341(1) (to be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff).

[134] H.R. Rep. No. 727, supra note 127, at 95-96, reprinted in 1986 U.S. Code Cong. & Admin. News 3607, 3685-3686.

[135] See supra notes 30-38 and accompanying text.

[136] See infra notes 482-483 and accompanying text.

Even in programs such as Social Security Disability Insurance, in which entitlement to cash assistance is based on a medical determination of disability, the statute and regulations fix the level and amount of benefits once the medical determination of eligibility has been made. In the Medicare program, on the other hand, the decisions on the level and amount of benefits as well as meeting the conditions for eligibility are medical decisions made primarily by physicians.[137]

2. Impact of Developments in Medical Technology

The Medicare program became more concerned with coverage policy starting in the early 1970s. There are two reasons for this interest: (1) unanticipated inflation in Medicare expenditures threatening the solvency of the Medicare program and the ability of the federal government to maintain a balanced budget;[138] and (2) rapid development of costly new technologies that aggravated this inflation.[139]

The serious and unexpected cost inflation in the health care system and the Medicare program prompted policy makers to look at Medicare payment and coverage policies more closely to see where cost savings could be achieved. When utilization review proved ineffective to control costs attributed to medically unnecessary care or care provided in an inappropriate setting, the Medicare program encouraged fiscal intermediaries and carriers to deny payment for claims for unnecessary and noncovered care.[140] The effect of this development was the

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[137] See supra notes 85-88 and accompanying text.

[138] See supra notes 103-106 and accompanying text.

[139] See infra notes 142-148 and accompanying text.

[140] J. Feder, supra note 89, at 41. For example, in 1972, HHS redefined the concepts of covered "skilled nursing care" more narrowly and non-covered "custodial" care more broadly in its health insurance manuals and regulations to reduce expenditures for skilled nursing facilities and encouraged Medicare contractors to deny coverage of claims on a retroactive basis through aggressive application of these coverage policies. See Butler, An Advocate's Guide to the Medicare Program, 8 Clearinghouse Rev. 831, 837 (1975) [hereinafter Butler, An Advocate's Guide]; S. Law, supra note 84, at 125-130; Wilson, Benefit Cutbacks In The Medicare Program Through Administrative Agency Fiat Without Protections: Litigation Approaches On Behalf of Beneficiaries, 16 Gonz. L. Rev. 533, 550-51 (1981) [hereinafter Wilson, Benefit Cutbacks]; see also Smits, Feder & Scanlon, Medicare's Nursing-Home Benefit: Variations in Interpretation, 307 New Eng. J. Med. 855 (1985); Loeser, Dickstein & Schiavone, Medicare Coverage in Nursing Homes -- A Broken Promise, 304 New Eng. J. Med. 353 (1982); Adler & Brown, Who Reviews the Reviewers?: A Retrospective Study of Medicare Determinations, 302 New Eng. J. Med. 842 (1980) (A study of denial patterns in one rehabilitation hospital).

The result of this approach to policing the provision of medically unnecessary care was that beneficiaries, through retroactive claims denial, bore the cost of uncovered and unnecessary medical care rather than the Medicare program and providers preventing the provision of such services in the first place. See S. Law, supra note 84. Congress has since endeavored to mitigate this burden through enactment of a so-called "waiver of liability" policy which require the Medicare program to pay for uncovered services that the beneficiary and/or provider believed in good faith were covered. Social Security Amendments transformation of Medicare coverage policy into a strategy for cost containment in a manner probably not contemplated by the architects of the Medicare program. As noted above, Congress has moved aggressively to establish better utilization review of inpatient hospital services provided to Medicare beneficiaries.[141] Congress has also attempted to redirect the balance in the PRO program in determining coverage in individual cases, at least with respect to inpatient hospital services, back to the medical profession but in a regulatory context.

The second reason for the emerging interest in coverage policy in the early 1970s was the virtual explosion in advances in medical technology during this period, much of which was inspired through advances in biomedical research funded by the National Institutes of Health (NIH).[142] These years witnessed the introduction of remarkable and expensive medical equipment, e.g., computerized tomography (CT) scanner[143] for the diagnosis and treatment of disease and the maintenance of life.[144] These developments precipitated extraordinary press

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of 1972 § 213, Pub. L. No. 92-603, 86 Stat. 1329 (codified as amended at Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 & Supp. 1985)).

[141] See supra notes 97-98 and accompanying text.

[142] See Banta & Behney, Policy Formation and Technology Assessment 59 Milbank Memorial Fund Q. 445 (1981); Warner, Effects of Hospital Cost Containment on the Development and Use of Medical Technology 56 Milbank Memorial Fund Q. 187 (1978); Iglehart, The Cost and Regulation of Medical Technology: Future Policy Decisions, 55 Milbank Memorial Fund Q. 25 (1977) [hereinafter Iglehart, The Cost and Regulation of Medical Technology].

Since World War II, the federal government has supported over half the biomedical research conducted in this nation. In 1985, total national expenditures for biomedical research were $13.1 billion of which the federal government spent 50 percent ($6.8 billion), industry spent 38 percent ($4.9 billion) and other sources, e.g., state governments and private, non-profit organizations, spent 11 percent ($1.3 billion). Dep't Health & Human Services, Public Health Serv., National Institutes of Health, NIH Data Book 4-5 (1987); see generally Fredrickson, Health and the Search for New Knowledge, 106 Daedalus 159, 160 (1977).

[143] The CT scanner epitomized the relationship between costly technological equipment and health system costs in the minds of many policy makers. This medical device, manufactured in Great Britain, takes extraordinarily effective non-invasive impressions of the head and body but costs over $1 million. Soon after its introduction on the market, most hospitals and even some physicians sought to purchase the CT scanner. See Iglehart, The Cost and Regulation of Medical Technology, supra note 142, at 30-35.

[144] Id. P. Starr, supra note 85, at 338-47. Most of the new medical technologies, e.g., renal dialysis or transplantation are "half-way" technologies that do not cure disease but sustain the patient and prolong life. These technologies tend to increase health care system costs. See, e.g., Rosenthal, Anticipating the Costs and Benefits of New Technology: A Typology for Policy in Dep't Health, Educ. & Welfare, Medical Technology: The Culprit Behind Health Care Costs? 78-87 (Proceedings of the 1977 Sun Valley Forum on National Health, 1977) [hereinafter Medical Technology: The Culprit Behind Health Care Costs?];

coverage[145] and the resulting pressures to make these new medical technologies available to Medicare beneficiaries. The most dramatic example of this phenomenon is Medicare's coverage of renal dialysis for persons with terminal kidney disease, which resulted in Congress mandating Medicare eligibility to individuals with End Stage Renal Disease.[146] Further, by the late 1970s, these extraordinary developments in medical technology were reflected in the referral of more complex coverage questions involving medical technologies to the Medicare

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Smits, The Clinical Context of Technology Assessment, 9 J. of Health Pol., Pol'y. & Pol. 31, 33 (1984); Schwartz & Joskow, Medical Efficacy Versus Economic Efficiency: A Conflict in Values, 299 New Eng. J. Med. 1462 (1978); Rettig, Medical Technology in a Changing Health Care Environment, in Am. Enterprise Inst., Charting The Future of Health Care (1987).

[145] See, e.g., Cherry, Medical Technology: The New Revolution, N.Y. Times Magazine, Aug. 5, 1979, at 12; Ebert, The New Technology--How Far, How Fast?, Am. Med. News, June 28, 1976, at 2.

[146] Social Security Amendments of 1972 § 299I, (codified as amended at 42 U.S.C. § 1395y(b) (1982 & Supp. 1985)). See also Iglehart, The Cost and Regulation of Medical Technology, supra note 142, at 47-50.

The story of the expansion of the Medicare program to include persons with end stage renal disease is fascinating. In the 1960s, physician investigators had perfected the process of kidney dialysis to cleanse the body of metabolic waste which the kidneys could no longer accomplish. But kidney dialysis was prohibitively expensive for most Americans with terminal kidney disease and furthermore, few kidney dialysis machines were available. See Rettig, The Policy Debate on Patient Care Financing for Victims of End-Stage Renal Disease, 40 L. & Contemp. Prob. 196 (1976); Rettig, End-Stage Renal Disease and the "Cost" of Medical Technology, in Medical Technology: The Culprit Behind Health Care Costs? supra note 144, at 88; Iglehart, The Cost and Regulation of Medical Technology, supra note 142, at 47-50. Physicians and hospitals were placed in the ethically awkward position of having to choose among patients who could benefit from this expensive, life-saving procedure. See, e.g., Kidney Treatment Called Arbitrary, New York Times, June 30, 1975, at 55, Col. 1.; Alexander, They Decide Who Lives, Who Dies, Life, Nov. 9, 1962, at 102.

program,[147] of which the most controversial coverage issue was coverage of heart transplantation.[148]

In the 1970s, scholars and policymakers identified the relationship between developments in medical technology and the cost inflation in the health care system and Medicare program.[149] In addition to several HEW conferences on the subject,[150] the National Science Foundation conducted a major study of medical technology and its impact on the health care system.[151] Several scholars documented the relationship between the dissemination of medical technology and increased costs in the Medicare program.[152] Other scholars argued that Medicare coverage policy should address this relationship more directly.[153] One scholar estimated that one-third of the annual cost of hospital services can be attributed to the growth in the so-called "intensity" of services used in the average hospital stay -- a result primarily of the use of more sophisticated medical technology.[154]

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[147] In the early years of the Medicare Program, national coverage policies concentrated on definitional issues about the appropriateness of the setting for inpatient care. See Health Care Fin. Admin., Health Care Fin. Admin. Rulings on Medicare, Medicare Professional Standards Review and Related Matters (four volumes published Jan. 1979, Apr. 1979, Apr.-Dec. 1979, Jan.-Sept. 1980). In the 1980s the national coverage policies focused more on coverage of new or questionable technologies, such as heart transplants and bilateral carotid body resection. See, e.g., Health Care Fin. Admin., HCFAR-80-1, Medicare Program; Exclusion of Heart Transplantation Procedures From Medicare Coverage, 45 Fed. Reg. 52, 296 (1980); HCFAR 80-2, Health Care Fin. Admin., Medicare Program; Exclusion from Medicare Coverage of Bilateral Carotid Body Resection to Relieve Pulmonary Distress, 45 Fed. Reg. 71,426 (1980).

[148] In 1980, HHS Secretary Patricia Roberts Harris deferred coverage of heart transplants and commissioned a thorough study of the question. Health Care Fin. Admin., Medicare Program; Exclusion of Heart Transplantation Procedures from Medicare Coverage, 45 Fed. Reg 52, 296 (1980); See Battelle Human Affairs Research Centers, National Heart Transplantation Study: Final Report (1984). In 1987, following this study, HHS authorized Medicare coverage of heart transplants in selected institutions having specialized resources. Health Care Fin. Admin, Medicare Program; Criteria for Medicare Coverage of Heart Transplants, 52 Fed. Reg. 10,935 (1987); see generally Knox, supra note 34. Cassells, Heart Transplantation: Recent Policy Developments, 315 New Eng. J. Med 1365 (1986).

[149] Gaus & Cooper, Technology and Medicare: Alternatives for Change (Background paper for Conference on Health Care Technology and Quality of Care, Boston University Health Policy Center, Nov. 1976); L. Russell, Technology in Hospitals: Medical Advances on Their Diffusion (1979); see also, Dep't Health & Human Services, Health Resources Admin., Health Capital Issues (1981); Dep't Health, Educ. & Welfare, Health Resources Admin., Capital Formation In Health Care Facilities (1979).

[150] See Dep't. of Health, Educ. & Welfare, National Center for Health Services Research, Medical Technology, (Research Proceedings Series, Sept. 1979); National Center for Health Services Research and Development, Technology and Health Care Systems in the 1980's (Conference Series, Jan. 1972); Medical Technology: The Culprit Behind Health Care Costs?, supra note 144.

[151] National Academy of Science, Medical Technology and the Health Care System: A Study of the Diffusion of Equipment-Embodied Technology (1979).

Congressional Action and Legislation. Congress was especially aggressive in addressing the relationship between costs of expensive new technology and the inflation in health care system costs, and many of the programs that Congress created during this period now play a key role in determining national coverage policy that pertains to new or questionable medical technologies.[155] In 1976, the relatively new congressional Office of Technology Assessment (OTA) expanded its mission to include assessment of medical technologies.[156] Following this initiative, OTA conducted numerous assessments of medical technologies such as the CT scanner and renal dialysis.[157]

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[152] Moloney & Rogers, *Medical Technology-A Different View of the Contentious Debate Over Costs*, 301 *New Eng. J. Med* 1413 (1979); Williams & Banta, *Improving The Use of Medical Technology*, 1 *Health Aff.* 86 (Spring 1982); Debakey & Debakey, *The Ethics and Economics of High-Technology Medicine*, 9 *Comprehensive Therapy* 6 (1983); Hellerstein, *Overdosing on Medical Technology*, 88 *Technology Rev.* 13 (1983); Schroeder, *Curbing the High Costs of Medical Advances*, *Business and Health*, July/Aug 1984, at 7; Blendon & Altman, *The Hidden Cost of "Little Ticket" Advances*, *Business and Health*, July/Aug. 1984, at 12; Fineberg, *Life, Death . . . and Dollars*, *The Sciences*, Dec. 1978, at 30.

[153] *See, e.g.*, Fineberg & Hiatt, *Evaluation of Medical Practices: The Case for Technology Assessment*, 301 *New Eng. J. Med.* 1086 (1979); Schroder, *Medical Technology and Academic Medicine: The Doctor-Producer's Dilemma*, 56 *J. Med. Educ.* 634 (1981); Greenberg & Derzon, *Determining Health Insurance Coverage of Technology: Problems and Options*, 119 *Med. Care* 967 (1981); Hellinger, *Controlling Costs by Adjusting Payment for Medical Technologies*, 19 *Inquiry* 34 (1982); Bunker, Fowles & Schaffartzick, *Evaluation of Medical-Technology Strategies: Effects of Coverage and Reimbursement*, 306 *New Eng. J. Med.* 620 (1982); Smits, *The Clinical Context of Technology Assessment*, 9 *J. Health Pol., Pol'y & L.* 31 (1984); Garrison & Wilensky, *Cost Containment and Incentives for Technology*, *Health Aff.* Summer 1986, at 46; *see generally* *R. Egdahl & P. Gertman*, *Technology and the Quality of Health Care* (1978).

[154] Blumenthal, *Federal Policy Toward Health Care Technology: The Case of the National Center*, 61 *Milbank Memorial Fund Q.* 584, 588 (1983), *citing* *P. Joskow*, *Controlling Hospital Costs: The Role of Government Regulation* (1981); *see also* Warner, *supra* note 142.

[155] In 1974, concerned that there was excessive and irrational distribution of health care technology in the health care system, Congress enacted the National Health Planning and Resources Development Act of 1974 to require states to conduct health planning and capital expenditure review activities. National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225, (codified as amended 42 U.S.C. §§ 300k-1 to 300n-6 (1982 Supp. II), *repealed by* Pub. L. No. 99-660, 100 Stat. 3799 § 701 (1987); *see* *B. Lefkowitz, Health Planning: Lessons for the Future* (1983); I *Inst. of Med.*, *Health Planning in the United States: Selected Policy Issues* 12 (1981). This statute required states to approve all proposed capital investment for medical equipment exceeding $150,000 and also required the federal government to set standards for the distribution of certain equipment, e.g., the CT scanner, in the nation. The Reagan Administration opposed the federally mandated health planning and capital expenditure review programs and, in 1986, Congress repealed the National Health

The Medical Device Amendments of 1976. To address the specific problems posed by the rapid development of new medical equipment and the concern, as well as concrete evidence, that many devices were ineffective or could even be harmful,[158] Congress enacted the Medical Device Amendments of 1976.[159] The law created a review process within the Food and Drug Administration (FDA) to regulate the safety and effectiveness of medical devices.[160] Regulating virtually all medical equipment,[161] this legislation establishes a three-tiered classification scheme which determines the nature of premarket review for a

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Planning and Resources Development Act of 1975. Many states have elected to retain capital expenditure review programs and some review investment in new medical equipment. See Simpson, Full Circle: The Return of CON Regulation of Health Facilities to State Control, 19 Ind. L. Rev. 1025 (1986).

[156] Office of Technology Assessment, Development of Medical Technology: Opportunities for Assessment vii (1976). See also Banta & Behney, supra note 142.

[157] See Office of Technology Assessment, Abstracts of Case Studies In The Health Technology Case Study Series (1983); Office of Technology Assessment, Abstracts of Case Studies In The Health Technology Case Study Series (1986). See also Iglehart, The Cost and Regulation of Medical Technology, supra note 142, at 30-31; Banta & Behney, supra note 142, at 451.

[158] See H. Rep. No. 853, 94th Cong., 2nd Sess., 7-8 (1976). See also S. Rep. No. 33, 94th Cong. 1st Sess, reprinted in 1976 U.S. Code Cong. & Admin. News 1970.

[159] Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended at the Federal Food, Drug and Cosmetic Act §§ 513-521, 21 U.S.C. §§ 301, 360c-k (1982 & Supp. 1985).

[160] Id.

The legislative history further explains the statutory purpose of the FDA medical device approval process as assuring "the reasonable safety and effectiveness of medical devices intended for human use." H.R. Rep. No. 1090, 94th Cong., 2d Sess. 51, reprinted in 1976 U.S. Code Cong. & Admin. News 1103; see also Hogan & Hartson Memorandum, supra note 17, at 56-84 (This memorandum outlines FDA approval process for medical devices in detail).

[161] Medical Device Amendments of 1976 § 3 (codified as amended at Federal Food, Drug and Cosmetic Act § 201(h), 21 U.S.C. § 321(h) (1982 & Supp. 1985)) (This section includes in the definition of medical device almost every conceivable piece of equipment used in the treatment of illness or injury).

medical device.[162] Class I devices pose minimal risk and need no formal review before marketing; Class II devices are similar enough to existing devices for which sufficient information exists to establish performance standards without formal premarket testing; and Class III devices are those for which insufficient information exists to create performance standards, and premarket testing under FDA supervision is required.[163] If a manufacturer believes that a new device is "substantially equivalent" to a device in commercial distribution before the Medical Device Amendments of 1976, or to a Class I or Class II device, it must notify FDA and, upon FDA concurrence, the manufacturer may market the device within 90 days of notification.[164] For a Class III device, the manufacturer must submit a premarket approval application and go through extensive testing of its safety and effectiveness.[165] Three criteria for approval of premarket applications include: (1) that the product has been assured to be safe and effective for use as contemplated in the label; (2) that the label is not false and misleading; and, (3) that the device meets any applicable performance standards.[166]

Technology Assessment in HEW. Within HEW, several important developments in the technology assessment area occurred. In 1977, the NIH acknowledged its strong influence on the development and diffusion of new medical technology through funding of biomedical research[167] and established the Office of Medical Applications Research to conduct Consensus Conferences to evaluate new as well as established medical technologies and associated treatment modalities.[168] In these conferences, the NIH convenes the leading experts in the field to develop conclusions about the efficacy of the treatment modality or technology used in the treatment of disease or injury.[169]

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[162] Medical Device Amendments of 1976 § 2 (codified as amended at Federal Food, Drug and Cosmetic Act §§ 513-515, 21 U.S.C. § 360c-e (1982 & Supp. 1985)).

[163] Federal Food, Drug and Cosmetic Act §§ 513, 21 U.S.C. §§ 360c (1982 & Supp. 1985).

[164] Federal Food, Drug and Cosmetic Act § 510(k), 21 U.S.C. § 360(k) (1982 & Supp. 1985); see Hogan & Hartson Memorandum, supra note 17, at 57-58, 63-71.

[165] Federal Food, Drug and Cosmetic Act § 515, 21 U.S.C. § 360e(b) (1982 & Supp. 1985); see Hogan & Hartson Memorandum, supra note 17, at 58, 71-85.

[166] Federal Food, Drug and Cosmetic Act § 515, 21 U.S.C. § 360e(d)(2) (1982 & Supp. 1985); see Hogan & Hartson Memorandum, supra note 17, at 71-72 n.154.

[167] In a relatively unsystematic but consistent fashion, basic biomedical research funded by the NIH has provided the requisite knowledge for the development of new medical technologies by private industry, i.e., new drugs and medical equipment. See Frederickson, supra note 142; Fineberg, Technology Assessment: Motivation, Capability, and Future Directions, 23 Med. Care 663 (1985); Perry, Diffusion of New Technologies, 1 J. Health Care Technology 73 (1984); Comroe & Dripps, Scientific Basis for the Support of Biomedical Science, 192 Science 105 (1976), Warner, supra note 142, at 191-202; Office of Technology Assessment, Development of Medical Technology: Opportunities for Assessment 67-88 (1976).

HEW also became increasingly concerned about how to advise the Medicare program about coverage of new technology and created the Office of Health Technology within the Office of Assistant Secretary of HEW.[170] In 1978, Congress established a specific medical technology assessment function within HEW with the creation of the National Center for Health Care Technology within the Public Health Service.[171] The statutory mandate of this Center was to give advice to the Medicare program and other federal health insurance programs on coverage of new technologies and to conduct assessments of new technologies as needed; but the Center had no regulatory function.[172] The statute spelled out additional criteria for the Center to consider in its technology assessments: "Such assessments shall take into account the safety, effectiveness, and cost effectiveness of, and the social, ethical, and economic impact of health care technologies."[173] This Center, however, was poorly funded during its brief existence although it did conduct some major technology assessments before it closed in 1982.[174] Upon its closure, HHS retained a technology assessment function and continued to rely on this statutory language as authority for its technology assessments for purposes of resolving Medicare coverage issues.[175]

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[168] See Perry & Kalberer, The NIH Consensus-Development Program and the Assessment of Health Care Technologies: The First Two Years, 303 New Eng. J. Med. 169 (1980); Greenberg, Health Care Technology: A Small Office vs. a Big Problem, 302 New Eng. J. Med. 243 (1980); see also Dep't Health & Human Services, National Institutes of Health, Guidelines For The Selection and Management of Consensus Development Conferences (1986).

[169] See Greenberg, supra note 168; see also Bernstein, National Institutes of Health Consensus Development Program, 48 Conn. Med. 513 (1984); Mullan & Jacoby, The Town Meeting For Technology: The Maturation of Consensus Conferences, 254 J. A.M.A. 1068 (1985).

[170] See Arnstein, Strategy for Health Technology, 13 Med. Instrumentation 14 (1979).

[171] Health Services Research, Health Statistics and Health Care Technology Act of 1978, Pub. L. No. 95-623, 92 Stat 3443 (codified as amended in scattered sections of 42 U.S.C. (1982 & Supp. 1985)). See Blumenthal, supra note 154; Perry, The National Center for Health Care Technology, 245 J. A.M.A. 2510 (1981) [hereinafter Perry, The National Center]; Perry, The Brief Life of the National Center for Health Care Technology, 307 New Eng. J. Med. 1095 (1982) [hereinafter Perry, The Brief Life]; Greenberg, supra note 168 (1981).

[172] Health Services Research, Health Statistics, and Health Care Technology Act of 1978 § 6, Pub.L. No. 95-623, 92 Stat. 3443 (codified as amended at Public Health Service Act § 309, 42 U.S.C. § 242n (1982 & Supp. 1985)).

[173] Id.

Developments in the 1980s. In 1981, American health policy shifted to the right following the election of Ronald Reagan.[176] The new President was not ideologically committed to the existing regulatory strategies for cost containment and utilization review that Congress and HHS had conceived during the 1970s. Rather, the Reagan Administration's health policy focused on making government health insurance programs more prudent purchasers of health care services through payment reforms such as the prospective payment system for hospitals, promoting competition in the market for health care services and deregulating the health care industry wherever possible.[177] In 1981, the Reagan Administration disbanded the National Center for Health Care Technology, maintaining that a federal role in technology assessment should be deemphasized.[178] The Center had always had critics in the medical profession and the health equipment industry who were afraid that the Center represented an inappropriate federal intrusion in the process of developing and marketing new medical technologies.[179] Nevertheless, the Public Health Service did continue to review technologies in order to advise HCFA on coverage of new technologies.[180]

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[174] See Blumenthal, supra note 154; Greenberg, supra note 168; Perry, The Brief Life, supra note 171; Perry, The National Center, supra note 171.

[175] Interview with Enrique Carter, M.D., Director, Office of Health Technology Assessment, National Center for Health Services Research/Health Care Technology Assessment, Public Health Services, Jul. 8, 1987.

[176] Wing, American Health Policy in the 1980's, 36 Case W. Res. 608 (1986), see also Stockman, Stockman's Inside Story, Newsweek, April 21, 1986, at 38-57; Comment, Reagan Administration Health Legislation: The Emergence of a Hidden Agenda, 20 Harv. J. on Legis. 573 (1983).

[177] See H.R. Doc. No. 24, 98th Cong., 1st Sess. (1983); Proposals to Stimulate Competition in the Financing and Delivery of Health Care, 1981 Hearings Before the Subcomm. on Health of the Comm. on Ways and Means of the House of Representatives, 97th Cong., 1st Sess. (1981); Medicare Reimbursement to Competitive Medical Plans, Hearing Before the Special Comm. on Aging, 97 Cong., 1st Sess. (1981); Enthoven, The Competition Strategy: Status and Prospects, 304 New Eng. J. Med. 109 (1981). See Feder, Holahan, Bovbjerg & Hadley, The Shift in Social Policy: Health, in The Reagan Experiment 271 (J. Palmer & I. Sawhill eds 1982).

[178] See Blumenthal, supra notes 154; Greenberg, supra note 168; Perry, The Brief Life, supra note 171; Perry, The National Center, supra note 171.

[179] See Blumenthal, supra at 154; Greenberg, supra note 168; Perry, The Brief Life, supra note 171; Perry, The National Center, supra note 171.

[180] Interview with Enrique Carter, M.D., supra note 66. See also Iglehart, Another Chance for Technology Assessment, 309 New Eng. J. Med. 509 (1983) [hereinafter Iglehart, Another Chance].

In addition to efforts to deregulate the health care system in the 1980s, Congress and HHS inaugurated important reforms in the coverage and payment procedures under the Medicare program. In 1982, as noted above, Congress established the peer review program as a means of aggressive utilization review of hospital services to Medicare beneficiaries in light of the anticipated movement to prospective payment.[181] Congress also created the Prospective Payment Assessment Commission (ProPAC) within OTA to work with HHS and Congress on updating the prospective payment rates and recalibrating the Diagnosis Related Groupings (DRGs) upon which the price per Medicare case was established.[182] This updating process involves consideration of the cost and efficacy of new medical technologies that affect the cost of care for patients within the DRGs, as well as whether the new technology or procedures should be a covered benefit under the Medicare program. Thus, ProPAC engages in some technology assessments in its analysis of how to modify the DRGs.[183]

Nevertheless, the concerns of congressional policymakers and the health care community about the safety and efficacy of new technologies never dissipated and, in the early 1980s, there were pressures from the private sector as well as from Congress for enhanced medical technology assessment activities. In the early 1980s, several medical professional groups initiated medical technology assessment efforts.[184] The American Medical Association (AMA) established its Diagnostic and Therapeutic Technology Assessment (DATTA) Program in 1982,[185] the American College of Physicians inaugurated its Clinical Efficacy Assessment Project during this period,[186] and other medical specialty societies have since established comparable programs.[187] In addition, the Blue Cross and Blue Shield Association, working with the American College of Physicians, developed its Medical Necessity Program to assess costly, but commonly used, technologies for purposes of determining coverage policies for its own health insurance programs.[188] Other Blue Cross and Blue Shield plans, as well as commercial health insurance companies, have begun similar programs of varying degrees of sophistication.[189] Finally, the American Hospital Association established a publication in its "Technology Service" to disseminate results of medical technology assessment that are of interest to its members.

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[181] See supra notes 97-99 and accompanying text.

[182] Social Security Act §§ 1886(d)(2)(B), 1886(d)(3)(A), & 1886(b)(3)(B), 42 U.S.C. §§ 1395 (d)(2)(B), 1395(b)(3)(B) (1982 & Supp. 1985).

[183] Prospective Payment Assessment Comm'n, Report and Recommendations to the Secretary, Dep't of Health & Human Services, 23, 32-35 (1985); Technical Appendixes to the Report and Recommendations to the Secretary, Dep't of Health & Human Services 71 (1985); Prospective Payment Assessment Comm'n, Report and Recommendations to the Secretary Department of Health and Human Services 16, 26-29 (1986); Prospective Payment Assessment Comm'n, Technical Appendixes to the Report and Recommendations to the Secretary, Department of Health & Human Services 83 (1986); Prospective Payment Assessment Comm'n, Report and Recommendations to the Secretary Department of Health & Human Services & Technical Appendixes 15, 29-31, 127-136 (1987); See generally Foote, Assessing Medical Technology Assessment, 65 Milbank Memorial Fund Q. 59 (1987).

[184] Iglehart, Another Chance, supra note 180; Foote, supra note 183.

[185] Jones, The American Medical Association's Diagnostic and Therapeutic Technology Assessment Program, 250 J. A.M.A. 387 (1983); Am. Med. Ass'n, DATTA: An AMA Program in Medical Technology Assessment (1987).

[186] Am. College of Physicians, Clinical Efficacy Assessment Project: Procedural Manual (1986); Am. College of Physicians, Clinical Efficacy Assessment Project, Recommendations 1981-86, (1987).

In the early 1980s, several influential physicians and other commentators, suggested changes in the technology assessment process for Medicare coverage. Specifically, they proposed creation of an independent, non-regulatory, non-profit institute, whose sole purposes would be collecting, analyzing and disseminating data on new medical procedures, and supporting clinical trials of selected technologies.[190] In 1982, the Institute of Medicine, responding to these suggestions,[191] established a committee to study the feasibility of a public-private consortium to conduct technology assessment and, in cooperation with the National Library of Medicine, to create a clearinghouse for information on medical technology assessments.[192] The Institute of Medicine also conducted a study of technology assessment published in 1985, which has been influential in shaping the current debate over how best to conduct technology assessment from a technical perspective.[193]

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[187] See Lewin & Associates, Inc., supra note 34, at Appendix B.

[188] Letter from Susan Gleason, Executive Director, Technology Management, Blue Cross and Blue Shield Association, to Eleanor D. Kinney (Aug. 10, 1987); see Lewin & Associates, Inc., supra note 34, at B23-B25; see also, Sox, Probability Theory in the Use of Diagnostic Tests, 104 Annals Internal Med. 60 (1986); Raffin, Indications for Arterial Blood Gas Analysis, 105 Annals Internal Med. 390 (1986); Centor, Meier & Dalton, Throat Cultures and Rapid Tests for Diagnosis of Group A Streptococcal Pharyngitis, 105 Annals Internal Med. 892 (1986); Goldberger & O'Konski, Utility of the Routine Electrocardiogram Before Surgery and on General Hospital Admission, 105 Annals Internal Med. 552 (1986); Tape & Mushlin, The Utility of Routine Chest Radiographs, 104 Annals Internal Med. 663 (1986).

[189] See Lewin & Associates, Inc., supra note 34, at B22-B29.

[190] See, e.g., Bunker, Fowles & Schaffartzick, Evaluation of Medical-Technology Strategies: Proposal for an Institute for Health-Care Evaluation, 306 New Eng. J. Med. 687 (1982); Rehlman, Assessment of Medical Practices: A Simple Proposal, 303 New Eng. J. Med. 153 (1980); Rehlman, An Institute for Health-Care Evaluation, 306 New Eng. J. Med. 669 (1982); see also Banta & Behney, supra note 142.

[191] See also Rehlman, Assessment of Medical Practices, supra note 190; Rehlman, An Institute for Health-Care Evaluation, supra note 190.

[192] See Iglehart, Another Chance, supra note 180; Marwick, Legislation Expands Federal Role in Medical Technology Assessment, 252 J. A.M.A. 3235 (1984); Brandt, Technology Assessment, A Private-Public Partnership, 99 Public Health Rep. 329 (1984).

The Disease Prevention and Health Promotion Act of 1985. In the Disease Prevention and Health Promotion Act of 1984, Congress reestablished a formal technology assessment function in HHS by expanding the responsibilities of the National Center for Health Services Research to become the National Center for Health Services Research and Health Care Technology Assessment.[194] The Office of Health Technology Assessment within the Center, as discussed above, is responsible for conducting technology assessments for procedures about which there are coverage questions under federally-funded health insurance programs.[195] The Act also established the National Advisory Council on Health Care Technology Assessment composed of officials in other branches of HHS and the federal government as well as outside experts in medicine, engineering, science, law, ethics, economics and management, to advise the Secretary of HHS on developing criteria and methods for making decisions about coverage under the Medicare and federal health insurance programs.[196] This council is currently reviewing the HCFA coverage policymaking process as it relates to new technologies and will publish its report in early 1988.[197]

In addition, the Health Promotion and Disease Prevention Amendments of 1984 authorized federal support to the Institute of Medicine to encourage creation of the Council on Health Technology, whose task would be to promote the development and application of appropriate health care technology assessments and to review existing health care technologies to identify obsolete and inappropriately used technologies as well as to fund private sector initiatives in technology assessment.[198] The Institute of Medicine and its Council on Health Technology are now developing a technology assessment initiative to coordinate technology assessment activities in the public and private sectors.[199]

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[193] Inst. of Med., Assessing Medical Technologies (1985).

[194] Health Promotion and Disease Prevention Amendments of 1984 Pub. L. No. 98-551, 98 Stat. 2815 (codified as amended at Public Health Service Act § 305; 42 U.S.C. § 242c (1982 & Supp. 1985). See Health Care Technology Assessment: Hearings Before the Senate Comm. on Labor and Human Resources, 98th Cong., 2d Sess. (1984); Health and the Environment, Part 4: Hearings Before the Subcomm. on Health and the Environment of the House Energy and Commerce Comm., 98th Cong., 2d Sess. (1984).

[195] Id.

[196] Marwick, supra note 192. Representatives from the Federal government include the Director of the NIH; the Chief Medical Director of the Veterans Administration, the Assistant Secretary for Health and Environment of the Defense Department, the Director of the Centers for Disease Control and a representative from HCFA. Health Promotion and Disease Prevent Amendments of 1984, Pub. L. No. 98-551, 98 Stat. 2815 (codified as amended at Public Health Service Act § 309; 42 U.S.C. § 242n (1982 & Supp. 1985)).

[197] Health Promotion and Disease Prevention Amendments of 1984 § 8 (codified at Public Health Service Act § 309(2), 42 U.S.C. § 242n (1982 & Supp. 1985)).

[198] Id.

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[199] See Inst. of Med., Council on Health Care Technology Interim Report (June 1987).

III. CRITIQUES OF THE MEDICARE COVERAGE POLICYMAKING PROCESS

A. Summary of Critiques

Criticism of the Medicare coverage policymaking process in recent years has taken several forms, yet sounded some common themes. In 1986, the Administrative Conference of the United States conducted an examination of the Medicare appeals system that resulted in recommendations for reform, particularly dealing with the issue of publication.[200] That issue also arose in the comments to the April 29th Notice by individuals and interest groups, many of whom also commented on the lack of accountability that flows from the absence of publication in the various coverage policymaking processes. Both HHS and OTA have conducted studies of the Medicare coverage policymaking process which address these and other concerns. Several additional studies are now underway.

Some of the most vocal criticism has arisen in the context of litigation by beneficiaries and, to a lesser extent, by providers. Several courts have invalidated Medicare coverage policies on the very grounds raised in the comments to the April 29th Notice, and have joined the criticism expressed in studies by the Administrative Conference of the United States and other commentators.[201] Finally, Congress has recently exhibited concern about the publication of coverage and other HCFA policies. In the House budget legislation, there is a provision requiring HCFA to publish such policies.[202]

1. The Administrative Conference of the United States

Following its study of the Medicare appeals system in 1986, the Administrative Conference of the United States recommended reforms in the process by which HHS makes national coverage policy. Responding to comments from diverse interest groups,[203] the Conference made several recommendations to improve publication of Medicare coverage policies. The Conference urged that HCFA make accessible all standards, guidelines and policies used in coverage decisions and allow for public comment on coverage policy in line with its earlier recommendation on publication of policies[204] if a coverage policy has a "substantial impact on the public."[205] The Conference also directed HCFA or Congress to require Medicare contractors to make accessible all "insurance industry rules or other screening devices" used in making coverage decisions.[206] As noted above, the Conference also recommended specific reforms in the process for making national coverage policy.[207]

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[200] See supra notes 8-11 and accompanying text.

[201] See infra notes 296-324 and accompanying text.

[202] H.R. 3545, Omnibus Budget Reconciliation Act of 1987, § 4073, 100th Cong., 1st Sess. (1987).

[203] Letter from Gordon Schatz, Assistant General Counsel of the Health Industry Manufacturers Association to Jeffrey Lubbers, Research Director of the Administrative Conference of the United States (Nov. 7, 1986) (Comments on recommendations to improve the Medicare appeals system); Letter from John B. Reiss of Dechart Price & Rhoads to Jeffrey Lubbers (Nov. 6, 1986) (Comments on recommendations to improve the Medicare appeals system); Letter from William Dombi, Attorney for Legal Assistance to Medicare Patients to Deborah Ross, Staff Attorney of the Administrative Conference of the United States (Oct. 28, 1986) (Comments on recommendations regarding the Medicare appeals system); Letter from Alfred Chiplin, Jr., Staff Attorney of the National Senior Citizens Law Center to William Bush of the Administrative Conference of the United States (Nov. 17, 1986) (Comments on draft Medicare appeals system).

2. The April 29th Notice

In response to HCFA's April 29th Notice, approximately 20 individuals and interest groups submitted comments including those who represent beneficiaries, physicians, hospitals, health equipment manufacturers and states that follow Medicare coverage decisions in making coverage policy for their Medicaid programs.[208] These comments reflect the most current concerns about the Medicare coverage policymaking process and are summarized below.

Beneficiary Concerns. Beneficiaries and their advocacy groups are profoundly critical of the Medicare coverage policymaking process at all levels.[209] Beneficiaries are most concerned with the second type of national coverage policy, where sophisticated scientific expertise is not necessary to make the coverage decision, and with national coverage determinations regarding more conventional items of durable medical equipment.[210] Consistent with this general concern, several handicapped individuals and advocacy groups criticized Medicare coverage policy for devices used by handicapped individuals. These individuals and groups protested repeatedly that the particular needs of handicapped individuals are not well understood in HCFA.[211] Many of the devices used by handicapped persons represent new and dramatic advances over conventional devices for the same purpose.[212] Yet HCFA declines coverage of many of these devices on the basis of criteria stated in the Medicare Carriers Manual that the Medicare program covers the least expensive device that will accomplish the intended purpose and only equipment that is primarily medical in nature.[213]

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[204] See Admin. Conference of U.S., Recommendation 76-5, Interpretative Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1987).

[205] Admin. Conference of the U.S., Recommendation 86-5, Medicare Appeals, 1 C.F.R. § 305.86-5 (1987).

[206] Id.

[207] Id. See supra notes 9-10 and accompanying text.

[208] Medicaid is a joint federal-state program providing hospital, physician and extensive nursing home services for persons on the Aid to Family with Dependent Children and Supplemental Security Income programs or, if the state elects, for persons who, but for income, meet the eligibility criteria for these categorical assistance programs. Social Security Act § 1902(a)(10), 42 U.S.C. § 1396a(a)(10) (1982 & Supp. 1985). Medicaid is financed out of federal revenues from general appropriations which match state expenditures for the Medicaid program. State programs must meet certain federal requirements to qualify for these federal matching funds. Social Security Act §§ 1901, 1902(a), 42 U.S.C. §§ 1396, 1396(a) (1982 & Supp. 1985).

[209] Letter from Cyril Brickfield, Executive Director of the American Association of Retired Persons to the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (June 26, 1987) (Comments on Medicare Program; Procedures for Medicare Services Coverage Decisions); Letter from Judith Waxman, Managing Attorney of the National Health Law Program, Inc. to HCFA (June 25, 1987) (Comments on Medicare Coverage Determinations Process); Letter from Jeffrey Spitzer-Resnick, Director of the Access for Senior Citizens Project of the Center for Public Representation to HCFA (June 26, 1987) (Comments on Medicare Coverage Decisions).

Beneficiaries are also concerned about coverage policy made locally by Medicare contractors and the HCFA regional office.[214] The handicapped expressed objections to the use of unpublished utilization screens and other policies by Medicare contractors defining frequency, intensity and duration of services for the handicapped.[215] Beneficiaries also question the current decentralized policymaking process that results in beneficiaries in different parts of the country getting different benefits.[216] The American Association of Retired Persons was especially vocal on this point, stating:

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[210] Letter from Sally Hart Wilson & Alfred J. Chiplin, Jr., Staff Attorneys of the National Senior Citizens Law Center to HCFA (June 18, 1986) (Comments on Medicare coverage determinations process).

[211] Letter from Steven White, Ph.D., Director of the Reimbursement Policy Division of the American Speech-Language-Hearing Association to William Roper, M.D. Administrator of HCFA (June 8, 1987) (Comments on procedures for medical services coverage decisions under the Medicare Program); Letter from Albert M. Cook, Ph.D., Director of the Assistive Device Center to HCFA (June 24, 1987) (Comments on Medicare coverage determination procedures); Letter from Joel D. Myerberg, Chairman of the Maryland Advisory Council for Handicapped Individuals to HCFA (June 23, 1987) (Comments on Medicare program, procedures for medical services coverage decisions); Letter from C. Gerald Warren, M.P.A., President of RESNA, Association for the Advancement of Rehabilitation Technology to HCFA (June 23, 1987) (Comments on Medicare procedures for coverage determinations); Letter from Mary Binion, Consultant to the Ohio Resource Center for Low Incidence and Severely Handicapped to HCFA (June 26, 1987) (Comments on Medicare coverage decision process); Letter from Rick Creech, user of augmentative communication devices to HCFA (June 23, 1987) (Comments on Medicare coverage determination process).

[212] Id.

[213] See supra note 546-547 and accompanying text.

[214] See supra notes 30-38 and accompanying text.

[215] See letter from Steven C. White, Ph.D., supra note 211.

[216] See supra note 209.

> First, since Medicare is a federal program, Medicare beneficiaries should in general have access to the same broad package of benefits. Carriers should not be permitted to deny coverage in all cases for a benefit when it is covered elsewhere, unless such denial is based on nationally accepted criteria of medical appropriateness and necessity.[217]

In addition, beneficiaries object to the lack of both public and regular procedures for making coverage policy of all types. As discussed below, beneficiaries have challenged HCFA coverage policy judicially on grounds that it has not been properly promulgated under the APA.[218] They are also concerned about HCFA's delays in making coverage policy that relate to new technologies. Beneficiaries claim that these delays effectively mean that they are denied the benefit of new technologies for which they cannot pay.[219]

Beneficiaries are particularly concerned about the criteria that HCFA uses in making and applying national coverage policy. They assert that the statutory criteria of "reasonable and necessary" do not contemplate the criterion of saving the Medicare program costs that beneficiaries believe both HCFA and Medicare contractors use in making coverage policy.[220] Beneficiaries would like to have all criteria for making coverage policy explicit in order to determine whether HCFA has complied with criteria, e.g., cost effectiveness, in making the challenged coverage policy.[221]

Beneficiaries are extremely critical of the new restrictions on administrative and judicial review of national coverage policy contained in the Omnibus Budget Reconciliation Act of 1986,[222] which imposed limits on administrative and judicial review of national coverage determinations. Beneficiary advocacy groups argue that if a broad definition of "national coverage determination" is applied, these restrictions sharply curtail the ability of beneficiaries to challenge national coverage policy effectively and virtually vitiate their rights to administrative and judicial review.[223]

Perhaps the greatest concern of beneficiaries regarding administrative and judicial review of Medicare coverage policy is that these policies establish inflexible and categorical prescriptions which apply to the cases of individual beneficiaries without regard to mitigating circumstances affecting the individual beneficiary's need for a particular item or service.[224] In light of this situation, beneficiaries find that they can modify the application of an individual coverage policy only upon administrative and judicial review, where the ALJ and the court can invalidate the coverage policy in question or at least conclude that it was inappropriately applied.

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[217] Letter from Cyril Brickfield, supra note 209.

[218] See infra notes 390, 421-429 and accompanying text.

[219] Telephone Interview with Sally Hart Wilson, Staff Attorney of the National Senior Citizens Law Center, Aug. 22, 1987.

[220] See supra note 209. See Wilson, Benefit Cutbacks, supra note 140; Butler, An Advocate's Guide, supra note 140.

[221] Telephone Interview with Sally Hart Wilson, supra note 219.

[222] Id.; see Omnibus Budget Reconciliation Act of 1986 § 9341 (To be codified at Social Security Act § 1869, 42 U.S.C. § 1395ff).

[223] See supra note 209.

However, the new limitations on administrative and judicial review inhibit the ability of ALJs, in particular, and federal judges to review the application of national coverage determinations in individual cases.[225] Furthermore, beneficiaries believe that administrative and judicial review is the most appropriate point for individual beneficiaries to challenge Medicare coverage policy, claiming that neither beneficiaries nor their advocacy groups have the requisite medical expertise to participate in an informed fashion in the formulation of coverage policy.[226]

Physician Concerns. The organized medical profession and other health professional groups objected most to the utilization screens, and other coverage policies of Medicare contractors, rather than national coverage determinations regarding medical technologies and procedures.[227] The concern regarding these screens is that their application with automatic denials of claims exceeding preset norms for frequency, duration or intensity of services effectively constitutes a coverage decision by the Medicare contractor that does not account for the specific circumstances of the individual patients involved.[228] Also, physicians and other health care professionals object to the fact that they are generally unaware of these screens and their medical rationale, and thus are unable to tailor their services to beneficiaries to comply with screens that comport with good medical practice. Addressing this issue, the American College of Physicians recommended that:

> Dissemination of coverage policy should be widespread so that

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[224] Id.; Telephone Interview with Sally Hart Wilson, supra note 219.

[225] Id.

[226] Id.

[227] Letter from Deborah M. Prout, Director of Public Policy of the American College of Physicians to HCFA (June 29, 1987) (Comments on Process for Medicare Coverage Determinations); Letter from Charles Harker, Esq., Director of Government Affairs of the American Physical Therapy Association to HCFA (June 24, 1987) (Comments on Medicare coverage process); Letter from W. Randall Rawson, Director of Governmental Relations of the American Chiropractic Association to HCFA (June 29, 1987) (Comments on Medicare coverage process); Letter from Steven White, Ph.D., supra note 211; Letter from James H. Sammons, M.D., Executive Vice President of the American Medical Association to William L. Roper, M.D., Administrator of HCFA (June 29, 1987) (Comments on the April 29th Notice); see also Interview with Kathy Buto, supra note 66.

[228] Letter from Deborah M. Prout, supra note 227; Letter from Charles Harker, Esq., supra note 227; Letter from W. Randall Rowsom, supra note 227; Letter from Steven White, Ph.D., supra note 211.

> providers and patients are not in a position of learning about coverage only when a claim is denied.[229]

The College pointed out that dissemination of coverage policy and its medical rationale could be an important means of improving quality of medical care for Medicare beneficiaries.[230] The College suggested that its Medical Necessity Project conducted with Blue Cross and Blue Shield Association, was a model for such an approach. The College observed further that "dissemination of credible medical information is sufficient to cause significant positive changes in practice patterns."[231] Advocacy groups for the handicapped have pointed out that where the Medicare contractor consulted with local professional groups, coverage policy conformed to better practice standards and was better accepted by providers.[232]

Interestingly, physicians and other health care professionals expressed little concern about the process for making national coverage determinations for medical technologies and procedures. The AMA reports considerable satisfaction with the extant process for making national coverage policy affecting new technologies and enjoys access and influence in the policymaking process because of frequent consultation with OHTA in particular and also with HCFA.[233] Nevertheless, in comments on the April 29th Notice, the AMA strongly supported HCFA's plans to make national coverage determinations "in a more public manner with greater reliance on outside expert opinion."[234]

It was interesting that the AMA and the American College of Physicians supported a pluralistic process for making coverage policy affecting new technologies which allowed Medicare contractors the flexibility to make coverage decisions regarding new technologies.[235] Specifically, the AMA urged that the coverage decisionmaking process be essentially a "bottom-up process" that included both collection and circulation of contractor decisions regarding new technologies and also greater public and physician input into coverage policymaking process:

> Since coverage issues are generally raised initially at the carrier level, carriers should continue to have authority to make initial coverage decisions. However, when a new service

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[229] Letter from Deborah M. Prout, supra note 227.

[230] Id.

[231] Id.

[232] See supra note 211.

[233] Telephone interview with William T. McGivney, Ph.D., Director of the Technology Assessment, American Medical Association (May 21, 1987).

[234] Letter from James H. Sammons, M.D., supra note 227.

[235] Id.; Letter from Deborah M. Prout, supra note 227.

> or technology is involved, the carrier also should be responsible to quickly report the determination to the HCFA Regional Office for broad dissemination of this decision. In this manner, other carriers will have greater information when they consider coverage determinations. The results of local decisions should be collected by the Bureau of Eligibility, Reimbursement and Coverage (BERC) which in turn should have authority to convene consensus panels, as well as utilize the HCFA physician's panel to review coverage determinations. Through such a bottom-up process, the Medicare program can be sensitive to innovation and practice variations that do exist around the country, as well as work toward greater uniformity in coverage. By following this federation-type process, beneficiaries will not be denied coverage for necessary and appropriate medical items or services simply based on where they reside--a condition that exists today.
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> An additional element in coverage determinations that will prove beneficial to both providers and beneficiaries is public and practitioner input into coverage determinations. Such input can be accomplished by allowing more lead time and public involvement in determinations of coverage for new technologies and services. By having such determinations made through a public forum, especially with the use of concensus panels, the health care community will likely be more aware of decisions and the facts upon which they are based, both while they are being considered and when made. Through such a process, beneficiaries will gain through better access to new services and technology. Concurrently, HCFA stands to gain also through fewer waiver of liability payments and greater uniformity throughout the carrier areas.

The American College of Physicians, while generally supportive of national criteria and standards for coverage policy, urged that Medicare contractors retain some flexibility in covering new technologies in order to encourage new innovations in medical diagnosis and treatment.[236] Further, the College emphasized that Medicare contractors be authorized to pay for the new technologies on an interim basis. To assure eventual national uniformity, the College suggested that Medicare contractors be required to report coverage decisions regarding new technologies to HCFA for monitoring and suggested the following coverage review process and the rationale for this process:

> In the development of medical technology, between the experimental stage in which a procedure is not reimbursable and the stage of general application by the practicing physician, which is reimbursable, there is a grey zone in which local carrier flexibility may be desirable. This grey zone is that significant and sometimes long period in which a technology is neither experimental nor ready for wide application, but during which -- when performed in certain

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[236] Letter from Deborah M. Prout, supra note 227.

> appropriate settings -- the technology may clearly benefit patients. If the local carrier has the flexibility to reimburse the procedure under these limited applications, HCFA could accumulate valuable data that would make a later decision on nationwide reimbursement better informed.
>
> We believe that HCFA should allow this flexibility and adopt procedures requiring local carriers to notify the central office of these unusual cases. This in turn should trigger a central monitoring process, so that HCFA can begin to put together information from the carrier together with assessment data from other sources and make a decision on national coverage as quickly as is appropriate.[237]

Hospital Concerns. Hospital providers also commented on the April 29th Notice.[238] Hospitals share the same concerns as other commentators about the lack of a public process for making Medicare coverage policy which prevents them from meaningful participation in the coverage policymaking process.[239] Hospitals also question whether restricting coverage of certain highly-specialized procedures to certain institutions, as in the case of the heart transplant benefit,[240] is legally permissable or fair.[241]

However, hospitals seem to be most concerned about the unpublished coverage policies of PROs and fiscal intermediaries that result in retroactive denials of payment for hospital services when applied. The reason for these objections is that they depart from conventional conceptions of quality care, and hospitals are unaware of these policies before they provide the services in question to Medicare beneficiaries.[242] Regarding these unpublished policies, the American Hospital Association stated:

> However, in many cases, Medicare is not enforcing prevailing standards of medical care. They are establishing new

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[237] Id.

[238] Letter from Jacqulin Harris, R.N., M.A., C.N.A.A., Director of Professional Services Delaware Valley Hospital Council, Inc. to HCFA (May 28, 1987) (Comments on Medicare program procedure for medical services coverage decisions); Letter from Jack Owen, Executive Vice President of the American Hospital Association to William Roper, Administrator of HCFA (June 29, 1987) (Comments on HCFA's procedures for making medical services coverage decisions).

[239] Id.

[240] Health Care Fin. Admin., Medicare Program; Criteria for Medicare Coverage of Heart Transplants, 52 Fed. Reg. 10935 (1987).

[241] Letter from Jack Owen, supra note 238.

[242] Letter from Jack Owen, supra note 238; Letter from Jacqulin Harris, supra note 238.

> standards that providers must infer from their payment denials. Medicare's contractors are not informative about the reasons for these coverage denials. Although PROs are required to notify a provider when a denial is issued, providers only receive general information that is not useful for discerning behavior changes expected by HCFA.[243]

Like physician groups, hospitals observe that this confusion over Medicare coverage policy and particularly its lack of publication makes it difficult for hospitals to know what is expected of them for purposes of future action.[244]

Hospitals also assert that the fact that HCFA has not explained the statutory criteria for coverage, i.e., "reasonable and necessary," more specifically or identified explicitly other criteria to be used in making coverage decisions results in insufficient guidance to Medicare contractors for making coverage decisions. Consequently, each Medicare contractor makes different coverage decisions for its own claims with "little agreement and uniformity" with other contractors about coverage of Medicare benefits.[245]

Health Equipment Manufacturer Concerns. Health equipment manufacturers are especially vocal critics of existing procedures for making national coverage policy under the Medicare program.[246] They have expressed two basic concerns. The first concern is how HCFA and Medicare contractors make and apply coverage policy regarding durable medical equipment and other more conventional medical devices and equipment and also how contractors determine whether use of a medical device was medically necessary and therefore covered in individual cases.[247] The Health Industry Manufacturers Association, the most vocal advocate for the medical equipment industry, has urged that HCFA should "clarify contractor's authority" to make coverage decisions where no national coverage decision applies and require that all contractors use the same criteria in making their coverage decisions as well as publicize the criteria they use in making coverage decisions.[248]

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[243] Letter from Jack Owen, supra note 238.

[244] Id.

[245] Letter from Jacqulin Harris, supra note 238.

[246] Health Industry Manufacturers Association, Recommendations of the HIMA Product Introduction Coordination Task Force (May 29, 1986) [hereinafter HIMA Recommendations]; Letter from Frank E. Samuel, Jr., President of the Health Industry Manufacturers Association to Barton McCann, M.D., Chief of the Special Coverage Issues Branch of the Office of Coverage Policy of the Bureau of Eligibility, Reimbursement and Coverage of the Health Care Financing Administration (Jun. 29, 1987) (Comments on Medicare Procedures and Criteria for Coverage Decisions); Letter from Craig Jeffries, Governmental Affairs Counsel of the Foster Medical Corporation, to Dr. William Roper, M.D., Administrator of HCFA (Jun. 26, 1987)) (Comments on Procedures for Medical Services Coverage Decisions); Letter from David A. Miller, President of the Medical Equipment Distributors, Inc. to the Health Care Financing Administration (Jun. 12, 1987) (Comments on Medicare Coverage Decision Procedures); see generally Schatz, Medicare Coverage of Technology, Health Span, Jul. 1987, at 9.

[247] Letter from Craig Jeffries, supra note 246.

The second concern of manufacturers is that the OHTA technology assessment process used in making national coverage policy regarding new medical technologies and equipment is duplicative of the mandatory FDA approval process for medical devices under the Medical Devices Amendments of 1976.[249] Specifically, manufacturers assert that the OHTA assessments of the "safety and effectiveness" of new medical technologies for Medicare coverage purposes[250] duplicates FDA review for "safety and effectiveness" under the Medical Devices Amendments of 1976.[251] This duplication, which critics argue is contrary to a statutory directive for coordinating technology assessment in HHS,[252] results in unnecessary and extensive delays in making coverage decisions affecting new equipment and technologies. Further, manufacturers assert that a negative decision for a medical device that has obtained prior FDA approval has significant financial consequences for the manufacturer and arguably may inhibit private development of new medical technologies.[253]

OHTA maintains that its assessments do not duplicate FDA assessments but generally cover only Class I and Class II medical devices for which premarket testing under FDA requirements is not required.[254] OHTA, however, reports that it rarely conducts full technology assessment on a Class III device for which FDA required full premarket testing, except in cases where the medical literature has subsequently questioned the safety or efficacy of the technology. OHTA reports further that most OHTA technology assessments involve Class I or Class II devices for which no premarket testing is required.

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[248] Letter from Frank E. Samuel, Jr., supra note 246. HIMA Recommendations, supra note 246.

[249] Id.; see also Bucci & Reiss, Technology Assessment of Medical Devices under Medicare: Who Should Examine "Safety and Effectiveness?", 40 Food Drug Cosm. L.J. 445 (1985) [hereinafter Bucci & Reiss, Technology Assessment]; Bucci & Reiss, Medical Device Regulation: A New Age of Frustration, The Health Law., 1 (Fall 1985).

[250] See supra notes 60-61 and accompanying text.

As explained above, the Health Services Research, Health Statistics and Health Care Technology Act of 1978, (codified at Public Health Service Act § 309, 42 U.S.C. § 242n (1982 & Supp. 1985)), specifically authorized the National Center for Health Care Technology to examine the "safety, effectiveness, and cost-effectiveness of, and the social, ethical, and economic impact of health care technologies" for purposes of assisting the Medicare program make coverage decisions. Although the Center went out of existence in 1982, the PHS technology assessment function continued to rely on this statutory language for authority as to criteria used in technology assessments for purposes of Medicare Coverage. Interview with Enrique Carter, M.D., supra note 66. 42 U.S.C. § 242n(b)(1) (1982 & Supp. 1985). See Bucci & Reiss, Technology Assessment, supra note 249.

[251] Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (codified as amended in scattered sections of 21 U.S.C. (1982 & Supp. 1985). See supra notes 158-166 and accompanying text.

[252] See Bucci & Reiss, Technology Assessment, supra note 249, at 448-449.

[253] See Letter from Frank E. Samuel, Jr., supra note 246.

[254] Interview with Enrique Carter, M.D., supra note 66.

Also, HCFA and OHTA maintain that their inquiry into "safety and effectiveness" of a medical device for purposes of determining Medicare coverage is different than FDA's inquiry in that HCFA and OHTA are concerned about the effectiveness of the device in curing or alleviating disease and FDA is concerned with whether the device performs as the manufacturer represents.[255] Further, OHTA and HCFA contend that their technology assessments regarding Class III devices pertain only to those devices about which questions regarding the continued efficacy of the device suggest that additional study is warranted.[256]

Health equipment manufacturers are also concerned about the non-public and irregular nature of the national coverage policymaking process.[257] These features, manufacturers assert, prevent affected manufacturers from knowing that HCFA is considering coverage policy affecting their products and precludes manufacturers and other interested parties from participating in the coverage policymaking process.[258] Manufacturers complain that HCFA and OHTA take too long in making national coverage determinations, thus limiting the availability of new technologies to Medicare beneficiaries and effectively limiting beneficiaries' access to new technologies since the Medicare program will not pay for a new technology until a national coverage determination is made.[259] Manufacturers want an opportunity for public participation in the HCFA Physicians Panel, publication in the Federal Register of coverage issues that the HCFA Physicians Panel will consider, and an opportunity to review OHTA findings and recommendations at the same time they are sent to HCFA since this would give manufacturers an opportunity to influence the HCFA decision on coverage.[260] The Health Industry Manufacturers Association has also argued for the right of manufacturers to appeal adverse coverage decisions to ALJs and the courts.[261]

The call by manufacturers for more defined procedures for making national coverage policy represents a sharp reversal from their former position on this issue. Previously, manufacturers objected to the involvement of the federal government in the technology assessment process in any capacity: they vigorously opposed establishment of the National Center for Health Care Technology in 1978 and supported its demise in 1982.[262] Their change in position occurred after inauguration of the prospective payment system for hospitals.[263] Under this payment system, coverage of new technology has more financial significance for hospitals because, if hospitals use a non-covered technology in treating a Medicare patient, fiscal intermediaries and PROs may deny payment for the entire hospital stay rather than just the procedure for which the technology was used.[264] Health equipment manufacturers have difficulty selling major medical equipment to physicians and hospitals without the imprimatur of Medicare coverage, and desire a Medicare coverage policymaking process that assures this imprimatur more expeditiously.[265]

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[255] Telephone interview with Barton McCann, M.D., supra note 56; Interview with Enrique Carter, M.D., supra note 66.

[256] Id.

[257] See supra note 246.

[258] Id.

[259] See supra note 246.

[260] Letter from Frank E. Samuel, Jr., supra note 246.

[261] HIMA Recommendations, supra note 246.

3. Government-Sponsored Studies

In response to continued concern about Medicare coverage policy and the process by which it is made, Congress and HHS have conducted and are now working on several studies of the Medicare coverage policymaking process, as well as HHS's technology assessment activities as they relate to that process. HHS has conducted two major studies on Medicare coverage policy.[266] The Congressional Office of Technology Assessment (OTA) has also conducted one study.[267] The National Advisory Council for Health Services Research and Health Care Technology Assessment and the Institute of Medicine's Council on Health Care Technology are now in the process of conducting studies as well.[268] Most of these studies have focused chiefly on the problems and methods of technology assessment, and not on the administrative law issues associated with promulgating and publicizing coverage policy or administrative or judicial review of Medicare coverage policy.

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[262] Perry, The Brief Life, supra note 171, at 1098-99; Iglehart, The Cost and Regulation of Medical Technology, supra note 142, at 36.

[263] See supra notes 107-108 and accompanying text.

[264] Interview with Kathy Buto, supra note 66.

[265] The Medicare program still pays hospitals for capital costs according to cost reimbursement principles thereby ensuring that hospitals will be paid their capital costs of depreciation and interest expense associated with new equipment. Social Security Act § 1861(v)(1)(A), 42 U.S.C. § 1395x(v)(1)(A)(1982 & Supp. 1985); 42 C.F.R. § 405.415-.418 (1986). Thus, hospitals are in a financial position to buy new equipment because the Medicare program will pay most of its share of the interest and depreciation costs on covered items and procedures within limits imposed under the Consolidated Omnibus Budget Reconciliation Act of 1985 § 9107, (to be codified at Social Security Act § 1886(g)(2), 42 U.S.C. § 1395ww(g)(2)). HHS has proposed discontinuing cost reimbursement for capital costs and paying these costs as part of DRG price. Health Care Fin. Admin., Medicare Program; Capital Payments Under the Inpatient Hospital Prospective Payment System, 52 Fed. Reg. 18,840 (1987) (to be codified at 42 C.F.R. § 405.412); see also Dep't of Health & Human Services, Hospital Capital Expenses: A Medicare Payment Strategy for the Future (1986).

[266] Lewin & Associates, Inc., supra note 34. Macro Systems, Inc., supra note 34.

[267] See infra notes 273-287 and accompanying text.

[268] See infra notes 289-291 and accompanying text.

Completed Studies. In the most recent study, commissioned by the HHS Office of the Secretary and prepared by Lewin and Associates, Inc., A Forward Plan for Medicare Coverage and Technology Assessment,[269] HHS sought to identify and assess options regarding both the appropriate goals and current needs for technology assessment and coverage decisionmaking in HHS and to explore ways to improve the coverage policymaking process without increasing costs.[270] This report identified the problems in the Medicare coverage policymaking process and proposed specific reforms. While the Lewin Report focused on the more technical, non-legal aspects of technology assessment and Medicare coverage policymaking process, it did include a legal analysis of the Medicare policymaking process by Hogan & Hartson.[271] However, this legal analysis did not address issues posed by provisions in the Omnibus Budget Reconciliation Act.

The Lewin Report identified the following problems with the Medicare coverage policymaking process: widespread uncertainty both in and out of government about the procedures and criteria for making national coverage policy, with no systematic means for public input and no systematic process for identifying technologies to be assessed or for addressing outmoded, unnecessary or overused technologies.[272] Indeed, the Lewin Report emphasized that the Medicare program now pays extensively for ineffective technologies and suggested that a tighter coverage policymaking process could preclude this situation.[273] The report also criticized OHTA for not taking advantage of new methodologies for technology assessment and, given public perceptions of duplication of assessments for medical devices in various federal agencies, maintained that OHTA and HCFA should do more to explain their technology assessment activities and coordinate them more closely with other government agencies.[274] The report also found that Medicare national coverage policy was neither uniformly understood by affected parties nor uniformly implemented by Medicare contractors.[275]

The Lewin report also criticized the lack of more specific criteria for explaining the general statutory criterion of "reasonable and necessary" and questioned whether the criterion of cost effectiveness and limitations on coverage of items or procedures to particular providers were authorized.[276] The

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[269] Lewin & Associates, Inc., supra note 34.

[270] Id., at i.

[271] See Hogan & Hartson Memorandum, supra note 17.

[272] Lewin & Associates, Inc., supra note 34 at 5, 3.2-3.9.

[273] Id. at 3.18.

[274] Id. at 5.

[275] Id. at 6.

[276] Id. at 6.

Hogan & Hartson legal memorandum maintained that HHS should promulgate a rule outlining the procedures, as well as the criteria, for making national coverage policy and concluded that, if HCFA did so, individual national coverage policies could be considered and promulgated as interpretative rules.[277] In addition, Hogan & Hartson concluded that HCFA could use cost effectiveness as a criterion in making national coverage policy without a statutory amendment, particularly if it promulgated a rule under § 553 of the APA stating that cost effectiveness would be used as a criterion for making coverage policy.[278] Hogan & Hartson also commented on the April 29th Notice, raising many of these and other points and calling generally for a more open coverage policymaking process.[279]

In 1984, HHS commissioned another study of the entire Medicare coverage policymaking process, Technology Assessment and Coverage Decisionmaking in the Department of Health and Human Services.[280] This study also identified similar problems with the Medicare coverage policymaking process as the Lewin report, but probed more deeply into the activities of Medicare contractors. The study found that the coverage policymaking process, because primarily reactive, often did not address technologies that might be relevant in terms of cost or quality of care of services to Medicare beneficiaries.[281] This study's findings and recommendations pertained more specifically to the technical deficiencies in making coverage policy, rather than to the procedures for making and disseminating coverage policies. However, the study did indicate a lack of regularity in the procedures for making and disseminating national coverage policy.[282]

The Congressional Office of Technology Assessment conducted a study of the Medicare coverage process in 1982 which also identified problems and recommended reforms in the Medicare coverage policymaking process.[283] This report, Medical Technology and Costs of the Medicare Program, focused on the impact of technology on Medicare program costs. In addition to recommending changes in payment methods for hospitals and physicians,[284] the report recommended changes in

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[277] Hogan & Hartson Memorandum, supra note 17, at 46.

[278] Id. at 27.

[279] Letter from Robert F. Leibenlift, Earl M. Collier, Jr., Helen R. Trilling & Ann Morgan Vickery to HCFA (Jul. 24, 1987) (Comments on Medicare Coverage Process).

[280] Macro Systems, Inc., supra note 34.

[281] Id. at ii, IV-2.

[282] Id. at iii, IV-2, 3.

[283] Office of Technology Assessment, Medical Technology and Costs of the Medicare Program (1982) [hereinafter Costs of the Medicare Program].

[284] Id. at 4, 156.

Medicare coverage policy for specific technologies.[285] The report noted that Medicare coverage policies were made primarily in deference to Medicare's statutory principles of not interfering with the practice of medicine and assuring beneficiaries a free choice of providers.[286] The report recommended that the Medicare program depart from this deferential posture in coverage policymaking, in light of its powerful position in the health care system, to promote efficient behavior on the part of providers, and use technology assessment criteria and methodologies that identify cost saving, as well as safe and effective technologies, for Medicare coverage purposes.[287] While an appended report identified some of the irregularities and inconsistencies in the process by which Medicare contractors made coverage policy,[288] the report did not analyze specific process with the procedures for promulgating or publicizing Medicare coverage policy.

Studies in Progress. The National Advisory Council to the National Center for Health Services Research and Health Care Technology Assessment is currently conducting a study, to be completed in December 1987, of the current OHTA technology assessment process used in making coverage decisions for federally-funded health care programs.[289] This study is focusing chiefly on the technology assessment process conducted by OHTA. Based on this study, the Advisory Council will develop recommendations to improve the Medicare coverage policymaking process that involves technology assessment for medical technologies and procedures.[290] The Institute of Medicine is also currently conducting a general study of technology assessment including how best to coordinate public and private technology assessment activities.[291]

B. Judicial Challenges to Medicare Coverage Policy

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[285] Id. at 4, 151.

[286] Id., at 11. See Social Security Act § 1801, 42 U.S.C § 1395a (1982 & Supp. 1985).

[287] Costs of the Medicare program, supra note 283, at 86-89. Specifically, report urged consideration of cost-benefit analysis and cost-effectiveness analysis analyzed in other OTA studies in conjunction with methodologies that assessed the quality of care afforded by a new technology. Id. See Office of Technical Assessment Strategies for Medical Technology Assessment (1982); Office of Technical Assessment, The Implications of Cost-Effectiveness Analysis of Medical Technology (1980).

[288] Demlo, Hammons, Kuder, Rogers & Lynch, supra note 34, at 191-205.

[289] Nat. Center for Health Services Research and Health Care Technology Assessment, National Advisory Council, Committee on Medicare Coverage Process, Study Protocol (1987).

[290] Id.

[291] See supra note 199 and accompanying text.

Beneficiaries and providers, to a lesser extent, have also challenged Medicare coverage policies in court since the inception of the Medicare program. Many of these challenges reflect the concerns about Medicare coverage policy discussed above. However, these challenges have been relatively few, given the statutory barriers that have been in effect until recently to preclude judicial review of Medicare coverage disputes. Specifically, until 1986, the Medicare statute only permitted administrative and judicial review of claims under Part A.[292] Other forms of action for judicial review of Part B claims of dissatisfied beneficiaries and providers were unavailable because of the bar to federal question jurisdiction in § 405(h) of the Social Security Act regarding claims under this Act, except when judicial review is otherwise authorized under the Social Security Act.[293]

In 1986, two significant events opened up the process for judicial challenge of Medicare coverage policy. First, the Supreme Court ruled in Bowen v. Michigan Academy of Family Physicians,[294] a case brought by Part B providers, that the statutory bar to federal question jurisdiction, in Social Security Act § 205(h) did not bar challenges to HHS policies but rather barred challenges to the amount of Medicare claims. Thus, for the first time since 1965, all Medicare coverage policies are subject to judicial challenge and review. The second event was Congress' authorization of administrative and judicial review of Part B claims, albeit only on a limited basis, in the Omnibus Budget Reconciliation Act of 1986.[295] As explained above, Congress also imposed significant limits specifically on the administrative and judicial review of national coverage determinations in that legislation.

Thus, since 1965, judicial challenge to Medicare coverage policy has been limited. Most challenges, particularly in the early years of the Medicare program, involved services for which Part A beneficiaries would sustain substantial financial liability for adverse coverage decisions, e.g., denials of skilled nursing or inpatient hospital care.[296] These challenges, it should be noted, also followed the Medicare program's frank policy change to define skilled nursing services more restrictively and custodial care more expansively in order to control the escalating costs of the skilled nursing benefit.[297]

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[292] See supra notes 114-118 and accompanying text.

[293] Social Security Act § 205(h); 42 U.S.C. § 405(h) (1982 & Supp. 1985). See Weinberger v. Salfi, 422 U.S. 749 (1975); see also Goldstein, The Procedural Impact of Weinberger v. Salfi Revisited 31 DePaul L. Rev. 721 (1982), Comment, Federal Question Jurisdiction over Medicare Provider Appeals after Weinberger v. Salfi: Toward a Principled Construction of the Statutory Bar, 65 Va. L. Rev. 1383 (1983).

[294] 476 U.S. 667 (1986).

[295] Omnibus Budget Reconciliation Act of 1986 § 9341(a)(2)(D) (To be codified as amended at Social Security Act § 1869, 42 U.S.C. § 1395ff).

[296] For cases involving disputes over coverage of services in a skilled nursing facility, see Mayburg v. Sec'y of Health & Human Services, 740 F.2d 100 (1st Cir. 1984); Tompkins v. Sec'y of Health & Human Services, [1986-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,334 (E.D.N.Y. Mar. 11, 1986); Mazzella v. Heckler, [Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,863 (D. Conn. Aug. 18, 1985); Kuebler v. Sec'y of the Dep't of Health & Human Serv., 579 F. Supp. 1436 (E.D. N.Y. 1984); Gerstman v. Sec'y of Health, Educ. & Welfare, 432 F Supp. 636 (W.D. N.Y. 1977); Klofta v. Mathews, 418 F. Supp. 1139 (E.D. Wis. 1976); Rine v. Weinberger, 401 F. Supp. 1134 (N.D. W.Va. 1975); Chodle v. Sec'y

In recent years, judicial challenges have increasingly involved coverage of specific items or procedures. The first category of cases has challenged coverage policy, including national coverage determinations regarding new technologies or experimental procedures.[298] For example, in *Heckler v. Ringer*,[299] beneficiaries challenged the application of HCFA's national coverage determination[300] and subsequent HCFA ruling[301] denying coverage for bilateral carotid artery resections used to relieve respiratory distress. The Supreme Court ruled that, pursuant to § 205(h) of the Social Security Act, the federal district court had no jurisdiction to hear these claims since three of the beneficiaries had not exhausted their administrative remedies. The Court ruled further that one plaintiff had no standing to bring suit since he had not yet received the treatment or submitted a claim.

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of Dep't of Health Educ. & Welfare, 368 F. Supp. 389 (N.D. Ill. 1973); Pippin v. Richardson, 349 F. Supp. 1365 (M.D. Fla. 1972); Reading v. Richardson, 339 F. Supp. 295 (E.D.Mo 1972); Ridgely v. Sec'y of the Dep't of Health, Educ. & Welfare, 345 F. Supp. 983 (D. Md. 1972); Johnson v. Richardson 336 F. Supp. 390 (E.D. Pa 1971); Sowell v. Richardson, 319 F. Supp. 689 (D. S.C. 1970).

For cases involving disputes over coverage of inpatient hospital services including rehabilitation hospital services, Lereum v. Heckler, 774 F.2d 210 (7th Cir. 1985); Hultzman v. Weinberger, 495 F.2d 1276 (3rd Cir. 1974); Tivan v. Weinberger, [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,001 (D. Mass. Aug. 23, 1979); Hartman v. Weinberger [1977 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 27,773 (M.D. PA, Jan. 23, 1976); Westgard v. Weinberger, 391 F. Supp. 1011 (D. N.D. 1975); Giove v. Weinberger, 380 F. Supp. 364 (D. Md. 1974); Whitman v. Weinberger, 382 F. Supp. 256 (E.D. Va. 1974); Schoultz v. Weinberger, 375 F. Supp. 929 (E.D. Wis. 1974); Samuels v. Weinberger, 379 F. Supp. 120 (S.D. Ohio 1973).

[297] *See* Butler, *An Advocate's Guide*, *supra* note 140; Wilson, *Benefit Cutbacks*, *supra* note 140.

[298] *See, e.g.*, Heckler v. Ringer, 466 U.S. 602 (1984); Jameson v. Heckler, [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,534 (E.D. Cal. Feb. 15, 1985); Mayfield v. Secretary, [1976 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 27,948 (N.D. Ill. July 1, 1976); *cf.*, Starnes v. Schweiker, 748 F.2d 217 (4th Cir. 1984) (challenge to reimbursement cap under Part B for computerized tomography scans barred on jurisdictional grounds).

[299] 466 U.S. 602 (1984).

[300] *Health Care Fin. Admin.*, *Medicare Coverage Issues Manual* § 357 (1987), *reprinted in* 4 Medicare & Medicaid Guide (CCH) ¶ 27,201.

[301] Health Care Fin. Rev., HCFAR 80-1, Medicare Program; Exclusion from Medicare Coverage of Bilateral Carotid Body Resection to Relieve Pulmonary Distress 45 Fed. Reg. 71,431 (1980).

In the most recent suit, *Jameson v. Bowen*,[302] involving an experimental procedure under Part B, the United States District Court for the Eastern District of California denied HHS's motion to dismiss and ruled that *Heckler v. Ringer* and *United States v. Erika, Inc.*[303] did not bar federal question jurisdiction and judicial review of the national coverage policy involved in this case. Subsequently, HHS entered into a settlement in which HHS agreed to publish a description of its procedures for making national coverage decisions.[304]

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[302] [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,534 (E.D. Cal. Feb. 15, 1985), *motion to dismiss denied*, [1987-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 36,073 (E.D. Cal. Feb. 20, 1987) (Settlement Agreement and Release of Claims).

[303] 456 U.S. 201 (1982).

[304] Jameson v. Bowen, [1987-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 36,073 (E.D. Cal. Feb. 20, 1987).

The settlement order provided:

> This Settlement Agreement and Release of Claims is made and entered into by and between Bernard F. Jameson ("Plaintiff") and Otis R. Bowen ("Defendant").
>
> WHEREAS, there is a bona fide dispute between the parties, and they desire to resolve this dispute without the time and expense of further litigation;
>
> NOW, THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, it is hereby stipulated and agreed, by and between the undersigned, that all of the claims asserted in this case by plaintiff are settled on the following terms:
>
> * * *
>
> 3. *Defendant agrees that the Health Care Financing Administration ("HCFA") will prepare a description of the process that it uses to make Medicare coverage decisions, including decisions as to whether new procedures are not covered because they have not yet have been found to be reasonable and necessary and/or safe and effective*. HCFA will publish the description in the *Federal Register* for public comment, and the procedure will allow for public input into the coverage decisionmaking process where appropriate. HCFA will publish the description in the *Federal Register* on or before May 1, 1987 [Emphasis the court's].
>
> 4. Defendant intends to publish a description of the process and criteria it uses to make Medicare coverage decisions, including decisions as to whether new procedures are not covered because they have not yet been found to be reasonable and necessary and/or safe and effective. HCFA intends to publish this description in the *Federal Register* for public input into the coverage decisionmaking process where appropriate. Because this publication will ultimately occur, or that if the publication occurs, it will occur by a specific date.
>
> * * *
>
> 6. The parties agree that this Settlement Agreement does not constitute in any manner a finding or admission of any violation of applicable law, rule, or regulation by defendant.

The second category of cases involved challenges to coverage of more conventional medical care items such as ambulance services or special types of durable medical equipment.[305] In a recent case, Forbes v. Bowen,[306] which challenged denial of coverage for defining when physical therapy services provided as part of home health care,[307] a federal district court overturned the ALJ's decision denying coverage on grounds that HCFA failed to show by substantial evidence that the therapy was not reasonable and necessary.

A recently filed case, Griffith v. Bowen,[308] has challenged the entire "Screening List for Durable Medical Equipment" that HCFA publishes as part of the Medicare Coverage Issues Manual[309] because it was not promulgated as a rule under the informal rulemaking requirements in § 553 of the APA.[310] One of the primary concerns of plaintiffs in this lawsuit is that the decision of whether an item of deductible medical equipment is covered is made categorically for all patients, and not with reference to the specific needs of individual beneficiaries. As explained above, the handicapped and other beneficiary groups are extremely concerned about national coverage policy pertaining to the "Screening List for Durable Medical Equipment," and other manual provisions regarding similar items.[311]

A third category of coverage cases involves challenges to utilization screens that Medicare contractors have established and used to make Medicare coverage decisions in individual cases.[312] In Fox v. Bowen,[313] the United States District Court for the District of Connecticut considered an intermediary-created policy denying coverage of physical therapy services for (1) non-weightbearing limbs; (2) amputees not being fitted for a prosthesis; and (3) termination of benefits when a patient could walk fifty feet.[314] The court ruled that these intermediary screens were contrary to the Medicare regulations outlining physical therapy services,[315] stating:

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[305] See Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986); Hatcher v. Harris, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,989 (8th Cir. Sept. 4, 1985) (dismissed on jurisdictional grounds); Leduc v. Harris, 488 F. Supp. 588 (D. Mass. 1980).

[306] No. CIV-2-86-339 (Jun. 10, 1987).

[307] See supra note 25 and accompanying text.

[308] Griffith v. Bowen No. I728EU86 (D. Mass. filed Feb. 13, 1986).

[309] See supra note 41 and accompanying text.

[310] See infra notes 354-355 and accompanying text.

[311] See supra note 211 and accompanying text.

[312] See Dirksen v. U. S. Dep't of Health & Human Services, 803 F.2d 1456 (9th Cir. 1986); Fox v. Bowen, [1986-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,374 (D. Conn. Apr. 23, 1986); see also Vorster v. Bowen, No. 84-9700 (C.D. Cal. filed Dec. 22, 1986); Duggan v. Bowen, No. 87-0383 (D.D.C. filed Feb. 17, 1987).

[313] [1986-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,374 (D. Conn. Apr. 23, 1986).

> It is contrary to such regulations for an intermediary to deny benefits on the basis of informal presumptions or "rules of thumb," that are applied across the board without regard to the medical condition or therapeutic requirements of the individual patient.[316]

More recently, in Duggan v. Bowen,[317] several Medicare beneficiaries, thirteen congressmen, the National Association for Home Care and several home health agencies filed suit in the United States District Court for the District of Columbia challenging HHS's "attempted dismantling of the Medicare home health benefit," essentially through delegation of the coverage decisionmaking process regarding home health benefits to Medicare contractors "without adequate supervision or regulatory mandate."[318] The complaint in this action states further:

> As a result, Medicare patients and providers of home health care services are faced with irrational and unexplained coverage determinations which fail to take into account and consideration individual patient needs, the attending physician's opinion, and community medical practice. The challenged actions are violating plaintiffs' rights under the Medicare statute, the Administrative Procedure Act, and the United States Constitution. Judicial relief is necessary to prevent further administrative erosion of the home care benefit that Congress has consistently determined is so crucial to the elderly and infirm of this nation.[319]

Most of these cases involved challenges to the coverage policy in question, on grounds either that it constituted a legislative rule not promulgated under notice and comment rulemaking procedures of § 553 of the APA[320] or that it was not properly publicized under § 552 of the APA.[321] Beneficiary advocacy groups have also maintained that many coverage policies, whether made by Medicare contractors or HCFA, constitute legislative rules imposing new obligations or limiting previous rights and therefore should be promulgated under the informal rule making procedures of § 553 of the APA.[322] In Duggan v. Bowen,[323] the plaintiffs are also claiming that HCFA's failure to define coverage policy for home health benefits in regulations or even program instructions and to guide Medicare contractors in the coverage decisionmaking process results in a "pattern of home care decisionmaking" which violates the fifth amendment as well as § 552 and § 553.[324]

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[314] Health Care Fin. Admin., Medicare Intermediaries Manual § 3101.08 (1987).

[315] 42 C.F.R. §§ 409.30-.36 (1987).

[316] [1986-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,374, at 10,938.

[317] No. 87-0383 (D.D.C. filed Feb. 17, 1987).

[318] Complaint at 6, Duggan v. Bowen, No. 87-0383 (D.D.C. filed Feb. 17, 1987).

[319] Id.

C. Major Problems with the Medicare Coverage Policymaking Process

Several common themes appear throughout the critiques of the Medicare coverage policymaking process and the litigation challenging Medicare coverage policy. From an administrative and constitutional law perspective, the problems with the Medicare coverage policymaking process fall into two categories: (1) problems related to the promulgation and publication of Medicare coverage policy; and (2) administrative and judicial review of Medicare coverage policy. The specific problems with Medicare coverage policy identified in this section will be analyzed in greater detail in Chapters IV & V of this article.

1. Common Themes

The most persistent criticism about the Medicare coverage policymaking process for all types of Medicare coverage policy is that the procedures and criteria for making coverage policy are not public or publicized. Further, the procedures provide little opportunity for interested parties to participate in the policymaking process or comment on individual coverage policies. Regarding the process for making national coverage determinations for medical technologies and procedure, critics are concerned about the informality of the structure and composition of the HCFA Physicians Panel, and also about the irregular and private way in which it conducts its business. Further, there is concern that HCFA, as well as Medicare contractors, are using criteria, e.g., cost effectiveness, for making coverage policy that are not publicized or suggested by the statutory language regarding coverage.

Providers especially maintain that as a result of the non-public coverage policymaking process, HCFA and its contractors are overlooking a potentially useful partner in the development of coverage policy and even utilization screens. If provider representatives can participate in the process of developing national coverage policy and utilization screens used by Medicare contractors, they will be more supportive of the policies and conform their practice accordingly.[325] Further, it is virtually impossible to expect providers to conform their practice to coverage policies of which they are completely unaware.

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[320] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982 & Supp. 1985).

[321] Administrative Procedure Act § 3, 5 U.S.C. § 552 (1982 & Supp. 1985).

[322] See Wilson, Administrative Procedure Act Provides Basis for Challenges to Medicare Manuals, 17 Clearinghouse Rev. 1211 (1983) [hereinafter Wilson, Administrative Procedure Act].

[323] See supra notes 315-317 and accompanying text.

[324] Complaint at 45, Duggan v. Bowen, No. 87-0383 (D.D.C. filed Feb. 17, 1987).

In general, commentators have criticized the decentralized nature of the coverage policymaking process, which encourages Medicare contractors to make coverage policy unless HCFA has made an applicable national coverage policy. Most comments to the April 29th Notice addressed the role of Medicare contractors in making Medicare coverage policy and the fact that the decentralized policymaking process resulted in different treatment of similarly-situated Medicare beneficiaries. Medicare beneficiaries, providers and other affected parties clearly want consistency in coverage policy and do not seem concerned that such consistency might threaten HCFA's concept of a decentralized policymaking process to accommodate variations in local health resources and medical practice.[326] These concerns are especially pertinent given important recent evidence that regional variations in medical practices are often not justified by conventional standards of medical practice.[327]

Another, quite different, concern is the nature of most Medicare coverage policies. Specifically, national coverage policies of all types, and also coverage policies of Medicare contractors including utilization screens, are stated in absolute and detailed terms which leave little room for discretion in their application. Thus, they are applied to Medicare beneficiaries without regard to the medical needs of the individual beneficiary or even to the fact that use of a particular procedure, item or service will be cost effective for the Medicare program in the long run.

In addition, critics are also concerned that the limitations in the Omnibus Budget Reconciliation Act of 1986 regarding national coverage determinations[328] insulates HCFA from accountability for making fair and accurate coverage policy at all levels. Under the current process for making national coverage determinations for medical technologies and procedures, and the extant procedures for administrative and judicial review of Medicare coverage determinations, there is no opportunity at any point -- either at the time of promulgation or through administrative or judicial review -- for beneficiaries and other affected parties to challenge specific coverage policies. Further, HCFA's statement in the April 29th Notice that national coverage determinations include all coverage policy published in all HCFA manuals raises the question of whether the limitations on administrative and judicial review of national coverage determinations in the Omnibus Budget Reconciliation Act of 1986 apply to other types of national coverage policy besides national coverage determinations regarding medical technologies. The Act itself uses the term "national coverage determination,"[329] but the legislative history suggests that Congress intended the term to apply only to coverage determinations regarding new medical technologies.[330] The implications of such an expansive reading of the statutory language are serious for beneficiaries, since this reading would virtually insulate HCFA from accountability for the definition of Medicare benefits in most situations.

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[325] See supra notes 227 & 238 and accompanying text.

[326] Letter from Jeffrey Spitzer-Resneck, supra note 209; Letter from Mary Binion, supra note 211; Letter from Jacqulin Harris, supra note 238; Letter from Deborah M. Prout, supra note 227. Letter from R. Charles Harker, supra note 227. Letter from Cyril Brickfield, supra note 209.

[327] See, e.g., Wennberg, Dealing with Medical Practice Variations: A Proposal for Action, 3 Health Aff. 6 (1984); Caper, Variations in Medical Practice: Implications for Health Policy, 3 Health Aff. 110 (1984).

[328] See supra notes 121-124 and accompanying text.

2. HCFA's Perspective

In analyzing the problems with the Medicare coverage policymaking process and administrative and judicial review of Medicare coverage policy, it is essential to appreciate HCFA's perspective. HCFA makes a large number of coverage policies annually about various types of services, new types of durable medical equipment and other items as well as new or questionable procedures and technologies. HCFA is operating under a strong mandate to control costs in the Medicare program[331] as well as serious constraints in terms of manpower and other resources to administer the Medicare program. HCFA needs a policymaking process for all national coverage policy that is fast, inexpensive, and requires minimal manpower.

HCFA is concerned that the informal rulemaking procedures under § 553 of the APA are simply too time-consuming and burdensome for all Medicare coverage policy and questions whether informal rulemaking would generate the comments from outside groups that would make use of the process worthwhile.[332] HCFA has an enormous agenda of legislative rules to promulgate annually[333] and, consistent with experience in other agencies,[334] it requires six months to a year to promulgate most legislative rules. It would clearly be impossible for HCFA to promulgate all program instructions that affect coverage of Medicare benefits as legislative rules. HCFA might be inhibited from providing guidance to beneficiaries and providers on important coverage issues if required to do so through notice-and-comment rulemaking.

Regarding national coverage determinations for medical technologies and procedures, HCFA is also concerned that opening up the policymaking process to permit public comment in the deliberations of the HCFA Physicians Panel, or in the BERC decisionmaking process, would subject HCFA to undue political pressure from Congress, health equipment manufacturers and other quarters to cover questionable technologies. It would seem, however, that political pressure is always present and must be dealt with regardless of whether a process is open or closed. In the long run, an open process that also assures medically defensible coverage policy will enable HCFA to withstand unwarranted political pressure more effectively. HCFA defends its need for the Omnibus Budget Reconciliation Act's restrictions on administrative and judicial review of national coverage determinations as necessary to preserve the scientific integrity of the national coverage determinations that are based chiefly on highly technical and medical information and judgments.[335]

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[329] See supra note 125.

[330] See supra note 132 and accompanying text.

[331] Office of Management and Budget, Budget of the United States Government, FY 1988, 2-10--2-11 (1987).

[332] Interview with Kathy Buto, supra note 66; Telephone Interview with Barton McCann, M.D., supra note 56.

[333] Health Care Fin. Admin., FY 1988 Regulations Agenda (1987).

[334] See infra note 455 and accompanying text.

3. Promulgation and Publication

Procedures and Criteria. There are two issues with respect to promulgation and publication of Medicare coverage policy: (1) whether and how to promulgate the procedures and criteria by which HCFA makes national coverage policy including national coverage determinations for medical technologies and procedures, and (2) how to promulgate individual coverage policies. HCFA has published a notice in the Federal Register describing the process for making national coverage determinations for medical technologies and procedures and its plans to promulgate a legislative rule establishing the procedures and criteria for making such national coverage determinations.[336] It is unclear whether HCFA's proposed rule would also include other types of coverage policy.

The fundamental question is the nature of the policymaking process that should be adopted for making Medicare coverage policy. Included in this question is when, if ever, should notice-and-comment rulemaking procedures under § 553 of the APA be invoked?[337] Further, what must HCFA do, if anything, to comply with the requirements for publication of policies in the Freedom of Information Act?[338] Finally, even if these APA provisions do not apply, what are the appropriate procedures for making Medicare coverage policy in a comprehensible, fair and public fashion?

Individual Coverage Policies. There are numerous problems with the current procedures for promulgating and publicizing individual national Medicare coverage policies. These difficulties have been outlined above. One critical problem with the promulgation and publication of Medicare coverage policy, suggested particularly in the litigation over Medicare coverage policy, is that not all coverage policy is published in the Medicare Coverage Issues Manual but is contained in other Medicare program manuals such as the Medicare Carriers Manual[339] or bulletins of HCFA regional offices. Further, not all coverage policy is specifically designated as coverage policy. The dispersed character of the designation and publication of Medicare program policies affecting coverage makes it extremely difficult for beneficiaries and their providers to get information on what health care services are actually covered under the Medicare program.

The publication and promulgation of coverage policies of Medicare contractors also remains problematic. Although the subject of a 1986 recommendation of the Administrative Conference of the United States[340] and not falling within the scope of this study of national coverage policy, problems with individual coverage policy are noteworthy because of the strong concern of beneficiary and providers regarding this type of coverage policy. This is an extremely troubling problem, as Medicare contractors make much of the coverage policy directly affecting beneficiaries and these policies are generally never published or available to beneficiaries or providers.

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[335] See supra note 202 and accompanying text.

[336] April 29th Notice, 52 Fed. Reg. 15,560 (1987).

[337] See infra notes 385-434 and accompanying text.

[338] See infra notes 446-448 and accompanying text.

[339] Health Care Fin. Admin., Medicare Carriers Manual (1987).

4. Administrative and Judicial Review

Administrative Review. There are several important problems with current procedures for administrative review of national coverage policy. One problem, of great concern to health equipment manufacturers, is that HHS has no mechanism for administrative reconsideration of a national coverage policy. This impedes the accountability of the Medicare coverage policy- making process by enabling all coverage policy to become effective upon decisions of individuals in lower levels of the bureaucracy. A second problem, of particular concern of health equipment manufacturers, is that current procedures provide no opportunity for parties other than beneficiaries, and providers in some instances, to appeal a national coverage policy to an ALJ.

The most serious problem regarding administrative review is that the Omnibus Budget Reconciliation Act of 1986 provides that ALJs may not adjudicate national coverage determinations in administrative appeals.[341] This provision represents a substantial curtailment of the authority of ALJs in adjudicating disputes over national coverage determinations, particularly because of the categorical nature of most coverage policy. This may actually eviscerate an effective administrative review process.

Judicial Review. The provision in the Omnibus Budget Reconciliation Act of 1986 requiring a court to remand to HHS when the court determines that the record is incomplete or otherwise lacks adequate information to support the validity of a national coverage determination, and only determine that a service is a covered benefit upon review of a supplemental record, is problematic.[342] This provision, because of the resulting time delays before final adjudication on the merits, puts another substantial barrier before parties challenging national coverage policy. While arguably justified because national coverage determinations are based on medical evidence and expertise, nevertheless this is troubling because of the barriers to beneficiaries, providers and other affected groups to influence the promulgation of a national coverage determination and to challenge a national coverage determination in administrative review.

The limitation in the Omnibus Budget Reconciliation Act of 1986 on challenges of national coverage determinations for failure to meet publication and promulgation requirements contained in Chapter 5 of the APA or the Social Security Act, is also problematic. Many courts have invalidated Medicare coverage policies for failing to comply with either § 552 or § 553 of the APA.[343] Thus, the effect of this statutory preclusion is to prevent beneficiaries and providers from enforcing the rights to which they are entitled under the APA, and to insulate HHS from accountability for observing these laws in the Medicare coverage policy making process.

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[340] See supra note 8.

[341] See supra notes 125-127 and accompanying text.

[342] See supra notes 125 & 133-134 and accompanying text.

[343] See infra notes 390-392, 422-429, 447-448 and accompanying text.

IV. PROMULGATION AND PUBLICATION

This section of the article analyzes the requirements for promulgation and publication of, first, the procedures and criteria for making national coverage policy including those for making national coverage determinations for medical technologies and procedures, and, second, individual national coverage policies of all types. This analysis will address the extent to which § 553 of the APA requires that HCFA observe § 553 notice-and-comment rulemaking requirements in establishing policymaking procedures and criteria for national coverage policy or in promulgating individual coverage policies. The analysis will also address what the Freedom of Information Act and the due process clause of the Fifth Amendment of the Constitution require as to promulgation and publication of policymaking procedures and criteria and individual coverage policies. Finally, this section of the article will suggest approaches to promulgation and publication of the procedures and criteria for making all types of national and individual coverage policy that allow for meaningful participation in the policymaking process by affected parties. These approaches also assure effective publication of Medicare coverage policies, especially to Medicare beneficiaries.

A. Promulgation Requirements under the APA and Social Security Act

To determine the requirements for promulgation and publication of Medicare coverage policymaking procedures and criteria as well as individual coverage policies, it is necessary to ascertain how they are defined in the Medicare statute and how they would be characterized under the APA.[344] The Medicare statute does not specifically address the procedures for making coverage policy or the character of individual coverage policies except to impose the limits on administrative and judicial review of national coverage determinations discussed above.[345]

The Social Security Act grants HHS authority to promulgate rules to implement the Medicare program by authorizing the Secretary of HHS "to prescribe such regulations as may be necessary to carry out the administration" of the Medicare program.[346] In this statutory provision, Congress accorded HHS sufficient authority to promulgate legislative and interpretative rules and policy statements regarding the Medicare program.[347]

The Social Security Act does identify certain procedures to be followed in promulgating regulations under the Medicare program. Specifically, in the Omnibus Budget Reconciliation Act of 1986, Congress required that HHS provide a comment period of at least sixty days prior to promulgation of most regulations under the Medicare program.[348] Regulations excluded from these requirements are those required by statute to be issued in interim final form or within 150 days of a statutory enactment, or those for which the "good cause" exception of § 553(b)(3)(B)[349] applies.[350] The fact that the limitations on administrative and judicial review of national coverage determinations are contained in the same provision of the Omnibus Budget Reconciliation Act of 1986 establishing these promulgation requirements for Medicare regulations indicates that Congress does not consider national coverage determinations to be legislative rules subject to the notice-and-comment rulemaking procedures of § 553 of the APA.[351]

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[344] Administrative Procedure Act § 4, Pub. L. No. 79-404, 60 Stat 237 (1946) (codified as amended at 5 U.S.C. § 553, (1982 & Supp. 1985)).

[345] See supra notes 121-134 and accompanying text.

[346] Social Security Amendments of 1965, Pub. L. No. 89-97, § 102(a), 79 Stat. 286, 291 (codified at Social Security Act § 1871, 42 U.S.C. § 1395hh (1982 & Supp. 1985)).

[347] See Admin. Conference of U.S., A Guide to Federal Agency Rulemaking 35 (1983) [hereinafter A Guide to Federal Rulemaking], citing Batterson v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980); See also K. Davis, Administrative Law Treatise § 7.8, at 36-39 (2d ed. 1979).

If the enabling statute is silent, the APA then governs the requirements for promulgating and publicizing agency rules and policies. The APA sections that govern agency policymaking are § 553, which outlines the requirements for when a policy or directive should be promulgated as a legislative rule and what procedures should be followed for making legislative rules,[352] and § 552, which outlines requirements for when and how agencies should publicize their policies, procedures and rules.[353]

1. Section 553 Rulemaking Requirements

The procedures for rulemaking under the APA are contained in § 553. For all agency rules except those specifically exempted, § 553 basically requires notice procedures and providing an opportunity for the public to participate in the rulemaking process "through submission of written data, views, or arguments with or without opportunity for oral presentation."[354]

According to § 553(a)(2), rules involving a "matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" are exempt from § 553 notice-and-comment rulemaking procedures.[355] Scholars, beneficiaries of government programs, and other observers have not viewed this second exemption favorably.[356] In 1969, the Administrative Conference of the United States recommended that Congress eliminate this exemption and that, in the meantime, agencies voluntarily use § 553 notice-and-comment rulemaking procedures when they are otherwise required.[357]

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[348] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9321(e), 100 Stat. 1874 (to be codified at Social Security Act § 1871(b), 42 U.S.C. § 1395hh(b)).

[349] Administrative Procedure Act § 4, 5 U.S.C. § 553(b)(3)(B) (1982 & Supp. 1985).

[350] Omnibus Budget Reconciliation Act of 1986 § 9321(e) (to be codified at Social Security Act § 1871, 42 U.S.C. § 1395hh(b)).

[351] See supra notes 346-347 and infra notes 354-362 accompanying text. See H.R. Rep. No. 1012, 99th Cong., 2d Sess. 350-351 (1986).

[352] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982 & Supp. 1985), See K. Davis, supra note 347, at §§ 6.10-6.14; B. Schwartz, Administrative Law §§ 4.6-4.10 (2d ed. 1984); A Guide to Federal Agency Rulemaking, supra note 347, at 16-71.

[353] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at Administrative Procedure Act § 3, 5 U.S.C. § 552 (1982 & Supp. 1985)).

[354] Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982 & Supp. 1985).

Medicare benefits are considered government benefits. Thus, under § 553(a)(2), rules regarding these benefits are exempt from § 553 notice-and-comment rulemaking procedures. In 1971, HEW published a notice in the Federal Register stating that it would observe such § 553 notice-and-comment rulemaking procedures where otherwise required by § 553.[358] In 1982, HHS published a notice in the Federal Register indicating its intention to reject this policy[359] but HHS never formally rescinded its 1971 policy. In 1986, as noted above, Congress codified this requirement with respect to specified Medicare program regulations.[360]

Section 553 delineates four different categories of rules. For three of these categories -- interpretative rules, general statements of policy and rules of agency organization, procedure, or practice -- compliance with § 553 notice-and-comment rulemaking procedures is not required.[361] The fourth category is "legislative" rules, or "substantive" rules as referred to in § 553(d),[362] and these rules are subject to § 553 notice-and-comment rulemaking procedures.

The question of what distinguishes a "legislative" rule from the other rules, for which notice-and-comment rulemaking procedures are not required, is confounding. This question has troubled agencies, courts, and scholars since the enactment of the APA in 1946.[363] The architects of the APA offered little explanation of the distinguishing characteristics of these different types of rules in the legislative history of the APA.[364] Indeed, the Senate Judiciary Committee declined to define a substantive rule further in the APA, stating that the meaning of the term "substantive" had been "well defined in court decisions and upon principle."[365]

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[355] Administrative Procedure Act § 4, 5 U.S.C. § 553(a)(2) (1982 & Supp. 1985).

[356] See A Guide to Federal Agency Rulemaking, supra note 345, at 26. See infra note 357.

[357] Admin. Conference of U.S., Recommendation No. 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-3 (1987); See Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts, 118 U. Pa. L. Rev. 540 (1970); A Guide to Federal Rulemaking, supra note 357, at 25-28.

[358] Dep't Health, Educ. & Welfare, Notice, Public Participation in Rulemaking, 36 Fed. Reg. 2532 (1971).

[359] Dep't Health & Human Services, Notice, Administrative Practices and Procedures, 47 Fed. Reg. 26,860 (1982); see also A Guide to Federal Rulemaking, supra note 347, at 27 n.44.

[360] See supra note 348-350 and accompanying text.

[361] Administrative Procedure Act § 4(a)(3)(A), 5 U.S.C. § 553(b)(3)(A) (1982 & Supp. 1985).

[362] Administrative Procedure Act § 4, 5 U.S.C. § 553(d) (1982 & Supp. 1985).

The legislative history of the APA is not otherwise particularly helpful in delineating specifically the character of interpretative rules and policy statements vis-a-vis legislative rules.[366] However, it does explain Congress's rationale for the different treatment of interpretative rules and policy statements, i.e., to encourage making such rules for guidance of regulated parties. Congress also perceived that interpretative rules and policy statements were subject to more scrutiny upon judicial review.[367]

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[363] See Davis, Administrative Rules--Interpretive, Legislative and Retroactive, 57 Yale L.J. 919 (1948); Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the A.P.A., 23 Admin. L. Rev. 101 1971); Koch, Public Procedures for the Promulgation of Interpretative Rules, 64 Geo. L.J. 1047 (1976); Comment, A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy, 43 U. Chi. L. Rev. 430 (1976) [hereinafter Comment, A Functional Approach]; Note, Administrative Law--The Legislative-Interpretative Distinction: Semantical Feinting with an Exception to Rulemaking Procedures, 54 N.C. L. Rev. 421 (1976). Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 520 (1977) [hereinafter Asimow, Public Participation]; Warren, The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules, 29 Admin. L. Rev. 367 (1977); Comment, An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures, 73 Geo. L.J. 1007 (1985) [hereinafter Comment, An Analysis of the General Statement of Policy Exception]; Note, The Interpretive Rule Exemption: A Definitional Approach to its Application, 15 Ind. L. Rev. 875 (1982) [hereinafter Note, The Interpretive Rule Exception]; Mayton, A Concept of a Rule and the "Substantive Impact" Test in Rulemaking, 33 Emory L. J. 889 (1884); Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 Duke L.J. 381 [hereinafter Asimow, Nonlegislative Rulemaking].

[364] See Davis, supra note 347; Asimow, Public Participation, supra note 363, at 532-33; Bonfield, supra note 363, at 108, 113-114; Comment, An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures, supra note 363, at 1012-1015.

[365] Senate Comm. on the Judiciary, 79th Cong., 1st Sess, Legislative History of the Administrative Procedure Act 19 (Comm. Print 1945), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act: Legislative History (1946) [hereinafter S. Doc. No. 248]; see Warren, supra note 363, at 371.

[366] See S. Doc. No. 8, 77th Cong., 1st Sess., Final Report of the Attorney General's Committee on Administrative Procedure 26-27 (1941) [hereinafter Final Report].

[367] S. Doc. No. 248, supra note 365, at 19; see also Final Report, supra note 366, at 100. U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

The distinction between "legislative" rules for which § 553 rulemaking procedures are required and exempt "interpretative rules" and "policy statements" has proven difficult for courts to articulate in challenges to agency rules and policies on grounds that the agency failed to comply with § 553 notice-and-comment rulemaking procedures.[368] Agency policies designated as "interpretative" rules, or other exempt rules, often effectively require a regulated party to modify behavior, as would a statute or legislative rule. Legislative rules also explain and clarify statutes as well as set policy for the agency.[369] Thus, courts have developed two tests to distinguish between legislative rules, for which notice-and-comment rulemaking procedures are required, and interpretative rules or policy statements, for which such promulgation procedures are not required.[370]

The first and more widely-accepted test is the so-called "legal effect" test. This test looks at how the agency designated its rule initially and whether the rule "makes 'new law,' as opposed to merely interpreting 'existing law.'"[371] A rule has a "legal effect" if it "fills a statutory gap by imposing a standard of conduct, erecting a new regulatory structure, or otherwise implementing congressional policy by completing an incomplete statutory design."[372] Another important factor determining whether a rule is legislative under the legal effect test is whether the rule is so inconsistent with the statute that it cannot reasonably be interpreting the statute but rather is creating new law.[373]

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[368] See, e.g., Cabais v. Egger, 690 F.2d 234 (D.C. Cir. 1982); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), cert. denied, 423 U.S. 824 (1975); Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974) rev'd on other grounds 426 U.S. 26 (1976); Lewis-Mota v. Secretary, 469 F.2d 478 (2d Cir. 1972); Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3d Cir. 1969); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); see Asimow, Public Participation supra note 363, at 520, 560-573; Bonfield, supra note 363, at 108-115; Warren, supra note 363, at 370-373; Note, The Interpretive Rule Exemption, supra note 363, at 875-877; Comment, An Analysis of the General Statement of Policy Exception, supra note 363, at 1007-1008.

[369] See Asimow, Public Participation, supra note 363, at 530; Asimow, Nonlegislative Rulemaking, supra note 363, at 384; Mayton, supra note 363, at 896-899; Comment, An Analysis of the General Statement of Policy Exception, supra note 363, at 1009-1011; see also Comment, A Functional Approach, supra note 363.

[370] See Asimow, Nonlegislative Rulemaking, supra note 363 at 393-402; Asimow, Public Participation, supra note 363 at 531; Comment, An Analysis of the General Statement of Policy Exception supra note 363; Mayton, supra note 363 at 904.

[371] Asimow, Nonlegislative Rulemaking, supra note 363, at 394; see also Mayton, supra note 363 at 904-906; see e.g., Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); accord. Lewis Mota v. Secretary, 469 F.2d 478; Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), cert. denied, 423 U.S. 824 (1976).

[372] Asimow, Nonlegislative Rulemaking, supra note 363, at 394; see e.g., American Postal Workers Union v. U.S. Postal Serv. 707 F.2d 548, 559 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1594 (1984); Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982); Batterton v. Marshall, 648 F.2d 694, 705-706 (D.C. Cir. 1980).

The legal effect test is problematic because it does not provide a means of distinguishing interpretative rules and policy statements that require changes in conduct of regulated parties and legislative rules.[374] Nor does it answer the question of whether an interpretative rule establishing new classifications or distinctions in a statute, as is often the case with Medicare coverage policy, has effectively modified statutory requirements like a legislative rule.[375] Finally, there is some concern that agencies may designate a truly legislative rule as interpretative in order to avoid public participation, to achieve faster promulgation, to permit retroactivity, or to discourage preenforcement judicial review.[376]

Dissatisfied with the legal effect test, some courts have adopted the "substantive impact" test. Under this test, rules that change "existing rights and obligations" are considered legislative rules subject to APA § 553 notice-and-comment rulemaking procedures.[377] These courts conclude that rules were legislative rules under this test if they have a substantial practical impact on a significant body of persons.[378] This test is basically conceived to address the problem that interpretative rules often require modifications in conduct, just as new law, and that agencies may tend to characterize rules as interpretative in order to take advantage of the important feature of interpretative rules, e.g., a simpler promulgation process.

The substantive impact test, however, has also failed to provide a mechanism for conclusively distinguishing between legislative rules and interpretative rules or policy statements at the time of promulgation. This is a critical feature and is necessary to avoid successful judicial challenge of the rule by dissatisfied parties, and thus uncertainty about the efficacy of the rule until judicial review.[379] Further, it is based on vague factors which can be easily manipulated by the parties involved,[380] and is not "judicially manageable."[381] Finally, as many scholars have observed, the test is fundamentally inconsistent with the exemptions for nonlegislative rules in the APA.[382]

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[373] See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), cert. denied, 423 U.S. 824 (1976); Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974); see also Asimow, Public Participation supra note 363, at 531, 556-557.

[374] Comment, An Analysis of the General Statement of Policy Exception, supra note 363 at 1010; Asimow, Public Participation, supra note 363, at 556-557.

[375] Id. See infra notes 430-434 and accompanying text.

[376] Asimow, Public Participation, supra note 363, at 556-557.

[377] See Texaco Inc., v. FPC, 412 F.2d 740 (3d Cir. 1969); Nat'l Motor Freight Traffic Ass'n v. U.S., 268 F. Supp. 90 (D.D.C. 1967) aff'd mem. 393 U.S. 18 (1968); accord., Pickus v. U.S. Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970); see also St. Francis Memorial Hosp. v. Weinberger, (N.D. Cal. 1975) (This case involved a Medicare manual payment provision in which the court applied the substantial impact test).

[378] See, e.g., Lewis-Mota v. Sec'y of Labor, 469 F.2d 478 (2d Cir. 1972); Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858, (D. Del. 1970); see also Asimow, Public Participation, supra note 363, at 545-560.

Neither the legal effect test nor the substantive impact test has provided a completely effective mechanism for determining, at the time of promulgation, whether a court will subsequently find that the rule was legislative and therefore should have been promulgated according to the notice-and-comment rulemaking procedures of § 553. In more recent decisions, the United States Court of Appeals for the District of Columbia resolves questions of whether notice-and-comment rulemaking should have been used to promulgate an agency policy in a pragmatic analysis of whether the agency intended the policy to be mandatory and its impact on regulated parties.[383] Nevertheless, it is the intractable problem of distinguishing between different types of rules that has led commentators to propose new methods for accomplishing a public promulgation process.[384] These new methods allow for effective notice and input from affected parties for interpretative rules and policy without unduly burdening agencies.

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[379] Asimow, _Public Participation_, _supra_ note 363, at 556-560; Asimow, _Nonlegislative Rule Making_, _supra_ note 363, at 400; Mayton, _supra_ note 363, at 904-905.

[380] Asimow, _Public Participation_, _supra_ note 363, at 556-558.

[381] Asimow, _Nonlegislative Rulemaking_, _supra_ note 363, at 400.

[382] _Id_. at 399. _See also_ _supra_ note 363.

[383] _See, e.g.,_ National Latino Media Coalition v. FCC, 816 F.2d 785 (D.C. Cir. 1987); Thomas v. State of N.Y., 802 F.2d 1443 (D.C. Cir. 1986); _cf._ Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986).

The Court in _National Latino Media Coalition v. FCC_, _supra_, stated the distinction between legislative and interpretative rules:

> [A legislative rule] is a rule that is intended to have and does have the force of law. A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. . . . An "interpretative" rule, by contrast, does not contain new substance of its own but merely expresses the agency's understanding of a congressional statute. [citations omitted]
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> Whether an agency has acted by legislative rule or interpretative rule turns not on "the nature of the questions they address but the authority and intent with which they are issued and the resulting effect on the power of a court to depart from the decision embodied in the rule." [Citing _Joseph v. U. S. Civil Serv. Comm'n_, 5543 F.2d 1140, 1153 n.24]

816 F.2d at 787-788.

[384] _See_ _supra_ note 363.

2. Procedures and Criteria for Making Medicare Coverage Policy

The first question to address with respect to APA requirements for Medicare national coverage policy is whether the procedures and criteria for making national coverage policy constitute a legislative rule subject to notice-and-comment rulemaking requirements of APA § 553.[385] Generally agency procedures for making policy which does not constitute a legislative rule fall within the exemption for an agency's rules of agency organization, procedure, or practice.[386] Nevertheless, the Freedom of Information Act does require that "the nature and requirements of all formal and informal procedures" must be published in the Federal Register.[387]

To date, HCFA has assumed that its procedures and criteria for making national coverage policy need not be promulgated as a legislative rule, for these procedures or criteria have never been so promulgated or published in the Federal Register as required by § 552 of the APA.[388] HCFA has not been specific as to what particular exemption applies to its procedures and criteria for making national coverage policy, although it would seem that one of the most appropriate would be an agency procedure exempt under § 553(b)(3)(A).[389]

One important case has addressed whether Medicare program procedures fall within the exemption from notice-and-comment rulemaking for agency procedures in § 553(b)(3)(A). In National Association of Home Health Agencies v. Schweiker,[390] the United States Court of Appeals for the District of Columbia Circuit ruled that a HCFA manual instruction establishing certain operating procedures was a legislative rule and not an exempt agency procedural rule under § 553(b)(3)(A). The rule involved was an instruction establishing new fiscal intermediaries for home health agencies and discontinuing the right of home health agencies to deal directly with HCFA for payment purposes. The court concluded the instruction was not exempt because it "does substantially affect the rights and interests of freestanding HHAs [home health agencies]" and this exemption does not apply, quoting Batterton v. Marshall,[391] "where the agency action trenches on substantive rights and interests."[392] Medicare coverage policy also trenches on substantial rights and interests in that it actually defines the entitlement interest of Medicare beneficiaries in the Medicare program.

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[385] See supra note 354 and accompanying text.

[386] Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b)(3)(A) (1982 & Supp. 1985).

[387] Freedom of Information Act § 3(a)(1)(B) (codified as amended at Administrative Procedure Act § 3, U.S.C. § 552(a)(1)(B) (1982 & Supp. 1985)).

[388] See infra notes 435-439 and accompanying text.

[389] Administrative Procedure Act § 4, 5 U.S.C. § 553(a)(3)(A) (1982 & Supp. 1985).

[390] 690 F.2d 932 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983); see Am. Hosp. Ass'n v. Bowen, 640 F. Supp. 453 (D.D.C. 1986) (In this case the district court for the District of Columbia invalidated HCFA instructions to hospitals and PROs on procedures for contracts between hospitals and PROs for purposes of establishing the requisite monitoring function of PROs under the prospective payment system because they had not been promulgated according to APA notice and comment rulemaking procedures.) See also W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987), pet. for reh. en banc denied and opinion amended, 819 F.2d 237 (9th Cir. 1987), (In this case, court held that motion review of ALJ decisions in Social Security disability a legislative rules subject to APA notice and comment rulemaking requirements).

The treatment of criteria is more complex in the case of Medicare coverage policy because of HCFA's use of criteria that are not specifically stated in the Medicare statute.[393] One important question regarding national coverage determinations for medical technologies and procedures is whether HCFA's acknowledged criteria of "non-experimental" and "widely accepted in the practice" is such a departure from the "reasonable and necessary" criteria in the Medicare statute that these criteria should be promulgated as a legislative rule.[394] Hogan & Hartson, in its legal analysis of the national coverage policymaking process for HHS, did conclude that the "reasonable and necessary" language in § 1862(a)(1)(A)[395] did encompass these criteria.[396]

Another important question is whether the statutory mandate in the Public Health Service Act[397] that OHTA consider safety, efficacy and effectiveness, as well as the cost effectiveness and appropriate uses of technology, in their technology assessments accords HCFA the authority to base national coverage determinations for medical technologies and procedures on these criteria.[398] Further, if these criteria are appropriate for making decisions about coverage of new technologies under the Medicare program, is it not also appropriate to use them in making coverage policy regarding durable medical equipment and other types of health care services raised in the majority of coverage questions?[399]

Of greater concern is whether the criterion of cost effectiveness, which has been advocated for use by some observers,[400] must be established in a legislative rule. Hogan & Hartson suggested that the provision in the Social Security Act requiring the Medicare program to deny payment for costs "found to be unnecessary in the efficient delivery of health care services"[401] provides statutory authority for HCFA to use the criterion of cost effectiveness.[402] Hogan & Hartson, therefore, concluded that HCFA can now use the criterion of cost effectiveness in making national coverage determinations.[403]

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[391] 648 F.2d 694 (D.C. Cir. 1980).

[392] 690 F.2d at 949, quoting Batterton v. Marshall, 648 F.2d 694, 708 (D.C. Cir. 1980).

[393] See supra notes 21-25 and accompanying text.

[394] See supra notes 23-24 and accompanying text.

[395] Social Security Act § 1862(a)(1)(A), 42 U.S.C. § 1395y(a)(1)(A) (1982 & Supp. 1985).

[396] Hogan & Hartson Memorandum, supra note 17, at 47.

[397] Public Health Service Act § 309, 42 U.S.C. § 242n (1982 & Supp. 1985).

[398] Public Health Service Act § 305(e)(2), 42 U.S.C. § 242c(e)(2) (1982 & Supp. 1985).

[399] See supra notes 42-48 and accompanying text.

Further, there is question whether HCFA's policy of limiting coverage of some procedures only to certain facilities meeting certain criteria constitutes a substantial departure from the statutory coverage criteria so as to require promulgation as a legislative rule.[404] As noted above, HCFA has adopted this policy only for heart transplants,[405] although some observers have advocated this approach to coverage policy for other types of procedures and services.[406] This type of coverage policy constitutes a sharp departure from HCFA's past practice as well as from HCFA's avowed policy principle that the Medicare program not interfere with the practice of medicine in individual institutions.[407] One practical problem with this policy, even though valid, is its susceptibility to invalidation under equal protection principles if HCFA treats comparable institutions differently.[408]

It should be emphasized that HCFA has decided to promulgate a rule under § 553 describing the procedures and criteria for making national coverage determinations this fall.[409] Regardless of whether this step is necessary under the APA, it comports with the recommendations of several studies conducted under HHS auspices.[410] Further, Hogan & Hartson recommended that HCFA promulgate all criteria for national coverage policy as a legislative rule.[411] Hogan & Hartson concluded that if HCFA did so promulgate all criteria for national coverage policy according to § 553 rulemaking procedures, then individual coverage policies would be interpretative rather than legislative rules.[412]

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[400] See Lewin & Associates, Inc. supra note 34, at 4, 3.34. This HHS commissioned study recommended strongly that HCFA should use cost-effectiveness as a criterion for making national coverage policy regarding new technologies.

[401] Social Security Act § 1861(v)(1)(A), 42 U.S.C. § 1395x(v)(1)(A) (1982 & Supp. 1985).

[402] See Hogan & Hartson Memorandum, supra note 17, at 21-22.

[403] Id. at 47.

[404] Id. at 30-34.

[405] Health Care Fin. Admin., Medicare Program; Criteria for Medicare Coverage of Heart Transplants, 52 Fed. Reg. 10,935 (1987).

[406] See Lewin & Associates, Inc. supra note 34, at 3.32; Medical Technology and the Cost of the Medicare Program supra note 283, at 108.

[407] Social Security Act § 1801, 42 U.S.C. § 1395 (1982 & Supp. 1985). See supra note 92 and accompanying text.

[408] See Hogan & Hartson Memorandum, supra note 17, at 31-32.

The big question remaining is whether this legislative rule will also describe the procedures for making other types of national coverage policy in addition to national coverage determinations for medical technologies and procedures. The April 29th Notice refers to coverage of "items" as well as "procedures."[413] However, it is unclear what HCFA means to include by the term "item" and, specifically, whether it means to include durable medical equipment or any other items used in the treatment of Medicare beneficiaries.

Individual Coverage Policies and National Coverage Determinations. The critical issue for specific coverage policies is whether they constitute legislative rules that must be promulgated under § 553's notice-and-comment rulemaking procedures. If specific coverage policies are legislative rules, then § 553(b) establishes the procedures, although not the criteria, for their promulgation and HHS need not establish other promulgation procedures. If specific coverage policies fall within one of § 553's exemptions, then there is question as to what promulgation procedures would be desirable to allow adequate input from affected parties in the coverage policymaking process as well as what form of publication must be observed, e.g., publication in the Federal Register, making them available to requesting parties or some other means.

HCFA has consistently taken the position that Medicare coverage policies of all types are not legislative rules subject to notice-and-comment rulemaking procedures in APA § 553.[414] HCFA maintains that national coverage determinations and other national coverage policies are interpretative rules which merely amplify and explain the basic coverage provision of the Medicare statute § 1862(a)(1)(A).[415] HCFA maintains further that it need not publish all national coverage policies in the Federal Register,[416] although in practice it often publishes national coverage determinations for medical technologies in the Federal Register or as HCFA rulings.[417] Also, Congress has clearly indicated that national coverage determinations regarding new technologies need not be promulgated as legislative rules because HHS has other effective means to provide notice and an opportunity to comment on these determinations.[418]

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[409] April 29th Notice, 52 Fed. Reg. 15,560 (1987); Jameson v. Bowen [1987-1 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶ 36,073 (E.D. Cal. Feb. 20, 1987) (Settlement Agreement and Release of Claims). See supra note 304 and accompanying text.

[410] See Lewin & Associates, Inc., supra note 34, at 8, 3.12; Macro Systems, Inc., supra note 34, at IV-5. See supra notes 269-282 and accompanying text.

[411] Hogan & Hartson Memorandum, supra note 17, at 44.

[412] Id. at 50.

[413] April 29th Notice, 52 Fed. Reg. 15,560 (1987).

[414] See April 29th Notice, 52 Fed. Reg. 15,560 (1987); Dep't Health & Human Services, Notice, Administrative Practices and Procedures, 47 Fed. Reg. 26,860 (1982); Dep't Health, Educ. & Welfare, Public Participation in Rulemaking, 36 Fed. Reg. 2532 (1971); see, e.g., Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986); Hatcher v. Heckler [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,989 (8th Cir. Sept. 4, 1985); John Muir Memorial Hosp., Inc. v. Schweiker, 664 F.2d 1337 (9th Cir. 1981); Kron v. Schweiker [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,136 (E.D. La. Aug. 23, 1982), modified, [1983-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,105 (E.D. La. Sept. 12,

The question of whether national coverage determinations for medical technologies and procedures, and other types of national coverage policies, should be promulgated according to APA § 553 notice-and-comment rulemaking procedures has been litigated.[419] In the few judicial decisions adjudicating this issue, the courts have split. Most decisions have upheld the coverage policies on grounds they are interpreting statutory provisions.[420] A few courts,

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1983); Leduc v. Harris, 488 F. Supp. 588 (D. Mass. 1980).

[415] See supra note 414.

[416] See Kron v. Schweiker, [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,136 (E.D. La. Aug. 23, 1982), modified, [1983-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,105 (E.D. La. Sept. 12, 1983).

[417] See supra notes 40-41 and accompanying text.

[418] See supra notes 131-132 and accompanying text.

[419] See infra notes 418-427 and accompanying text.

[420] See, e.g., Hatcher v. Heckler [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,989 (8th Cir. Sept. 4, 1985); John Muir Memorial Hosp., Inc. v. Schweiker [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,613 (9th Cir. Nov. 12, 1981); St. Joseph Hosp. v. Heckler, 570 F. Supp. 434 (N.D. Ind. 1983); Leduc v. Harris, 488 F. Supp. 588 (D. Mass. 1980).

In similar challenges to Medicare payment policies, courts have upheld the applicable manual provisions, see, e.g., Samaritan Health Services v. Bowen, 811 F.2d 1524 (D.C. Cir. 1987); St. Mary's Hosp. of Troy v. Blue Cross & Blue Shield Ass'n, 788 F.2d 888 (2d Cir. 1986); Baylor Univ. Med. Center v. Heckler 758 F.2d 1052 (5th Cir. 1985); Homan & Crimen, Inc. v. Harris, 626 F.2d 1201 (5th Cir. 1980), cert. denied, 450 U.S. 975 (1981); Fairfax Nursing Center, Inc. v. Califano, 590 F.2d 1297 (4th Cir. 1979); Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250 (3d Cir. 1978); Humana of S.C., Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978); N.J. Chapter, Inc. of the Am. Physical Therapy Ass'n Inc. v. Prudential Life Ins. Co., 502 F.2d 500 (D.C. Cir. 1974), cert. denied, 420 U.S. 1004 (1975); Am. Med. Ass'n v. Heckler, 606 F. Supp. 1422 (S.D. Ind. 1985); Spartanburg Gen. Hosp. v. Heckler, 607 F. Supp. 635 (D.S.C. 1985); Biomedical Applications of Providence, Inc. v. Heckler, 593 F. Supp. 1233 (D.D.C. 1984); Alexander v. Schweiker, 516 F. Supp. 182 (D. Conn. 1981); Humana of Ky., Inc. v. Harris, [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,610 (W.D. Ky. Feb. 13, 1981); St. Francis Memorial Hosp. v. U. S. [1981-1 Transfer in cases involving Medicare payment policies for hospitals, have ruled that HCFA did not have to comply with notice-and-comment rulemaking because Medicare regulations pertained to government benefits and thus were exempt from § 553 requirements pursuant to § 553(a)(2) of the APA.[421]

However, the Ninth Circuit did invalidate a national coverage policy for failure to comply with § 553 notice-and-comment rulemaking procedures[422] and, since the Supreme Court's decision in Bowen v. Michigan Academy of Family Physicians[423] which expanded the opportunity for judicial challenges of Medicare coverage policy, there have been several such challenges to other national coverage policies in the federal courts.[424] Many of these cases have challenged the utilization screens and other coverage policy of Medicare contractors on

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Binder] Medicare & Medicaid Guide (CCH) ¶ 31,047 (Ct. Cl. May 6, 1981); Portland Adventist Med. Center v. Harris [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,484 (D. Ore. Feb. 5, 1980); Research Med. Center v. Schweiker, [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,593 (W.D. Mo. Oct. 8, 1981); Am. Med. Int'l, Inc. v. Secretary, 466 F. Supp. 605 (D.D.C., 1979); Harris Hosp. v. Group Hosp. Serv., Inc., [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 29,910 (N.D. Tex. June 7, 1979); Hillhaven, Inc. v. Califano, [1977 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 28,733 (D.D.C. Jan. 11, 1978); Heritage Manor of Chattanooga, Inc. v. Califano [1977 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 28,731 (E.D. Tenn. Nov. 28, 1977); Sierra Vista Hosp. Inc. v. Weinberger [1975 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 27,440 (D.C. Cal. May 30, 1975).

[421] See Baylor Univ. Med. Center v. Heckler, 758 F.2d 1052 (1985); St. Francis Memorial Hosp. v. U. S. [1981-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,047 (Ct. Cl. May 6, 1981); Good Samaritan Hosp. v. Mathews, 609 F.2d 949 (9th Cir. 1979); Humana of S. C., Inc. 590 F.2d 1070 (D.C. Cir. 1978); Research Med. Center v. Schweiker [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,593 (W.D. Mo. Oct. 8, 1981); Alexander v. Schweiker, 516 F. Supp. 182 (D. Conn. 1981).

[422] Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986). See supra note 305 and accompanying text.

[423] 476 U.S. 667 (1986).

[424] See Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986); Jameson v. Heckler, [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,534 (Feb. 15, 1985), Griffith v. Bowen, No. I728EU86 (D. Mass. Complaint filed Feb. 13, 1986).

There have also been successful challenges to manual provisions regarding payment policies, see, e.g., Starnes v. Harris, [1980 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 30,412 (D.S.C. Mar. 6, 1980); Christian Hosp. of St. Louis v. Califano, [1978 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 28,968 (E.D. Mo. Feb. 28, 1978); Schupack v. Mathews [1976 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 27,987 (D.D.C. Sept. 17, 1976); see also Am. Hosp. Ass'n v. Bowen, 640 F. Supp. 453 (D.D.C. 1986) rev'd, No. 86-5579 (D.C. Cir. Dec. 4, 1987). In Home Health Care, Inc. v. Bowen, 639 F. Supp. 1124 (D.D.C. 1986); Nat'l Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983).

grounds that such policies are effectively legislative rules that should be promulgated under § 553 notice-and-comment rulemaking procedures.[425]

Linoz v. Heckler[426] is the only case to date to rule on the merits of whether a national coverage policy must be promulgated under § 553 notice-and-comment rulemaking procedures. In this case, HCFA denied payment for ambulance services for a beneficiary who needed a particular specialty service. The basis for the denial was a Medicare Carriers Manual provision that "a physician in a specific specialty does not make that hospital the nearest hospital with appropriate facilities" and the ambulance services in question had not taken the plaintiff to the nearest hospital as defined by the manual.[427] This manual provision was based on a regulation requiring that patients in need of ambulance services be transported to "the nearest institution with appropriate facilities."[428] The Ninth Circuit concluded that the manual provision should have been promulgated as a legislative rule under § 553 because this rule "withdrew coverage previously provided and thus 'effected a change in existing law or policy.' [Citation omitted]."[429]

Whether Medicare coverage policies are legislative or interpretative rules is an intractable question. Coverage policies define specific items or procedures that are covered under the statutory criteria of "reasonable and necessary."[430] They are interpretative in that they often identify specific examples of items or procedures that the statute criteria of "reasonable and necessary" would or would not encompass as covered Medicare benefits. But because they limit benefits by denying coverage for items and procedures that one might reasonably expect would be reasonable and necessary for the treatment of disease or injury, it can be persuasively argued that they are legislative rules. Any unexpected restriction on benefits has a substantial impact on beneficiaries, and the requisite legal effect in that the Medicare program will not pay for the item or service that the policy says is not covered.

This was certainly the rationale of the Ninth Circuit in Linoz v. Heckler[431] in ruling that a coverage policy was a legislative rule that should be promulgated according to § 553 notice-and-comment rulemaking procedures.[432]

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[425] See Vorster v. Bowen, No. 84-9700 (C.D. Cal. filed Dec. 22, 1986); Griffith v. Bowen, No. I728EU86 (D. Mass. filed Feb. 13, 1986).

[426] 800 F.2d 871 (9th Cir. 1986).

[427] Health Care Fin. Admin., Medicare Carriers Manual § 2120.3F, (1986).

[428] 42 C.F.R. § 405.232(i) (1986).

[429] 800 F.2d at 877, citing Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983).

[430] See supra note 16 and accompanying text.

[431] 800 F.2d 871 (9th Cir. 1986).

[432] See supra note 305 and accompanying text.

Similarly, in Herron v. Heckler,[433] involving a challenge to an agency manual provision limiting the type of property considered in making eligibility determinations under a Social Security welfare program, a federal district court ruled that these provisions were legislative because they "created precise, objective limitations where none existed before."[434] National coverage policies are clearly analogous to this type of policy. In general, they create precise and objective limitations regarding items and services that are used to treat illness or injury that one would not necessarily expect from the general statutory criteria of "reasonable and necessary."

B. Publication Requirements Under the APA

1. Section 552 Publication Requirements

If a rule is not a legislative rule for which § 553 notice-and-comment rulemaking procedures are required, the next inquiry is what does the Freedom of Information Act require in terms of publication. The Freedom of Information Act, codified in § 552 of the APA, generally requires publication of agency policies that affect the public.[435] Subsection 552(a)(1)(D) requires that "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability" must be published in the Federal Register for "guidance of the public."[436] Similarly, the "requirements of all formal and informal procedures" must also be published in the Federal Register.[437] If an agency fails to comply with this publication requirement, the APA provides that "a person in any manner . . . may not be adversely affected" by the unpublished rule or policy unless that person had "actual and timely notice" of the terms thereof."[438] Subsection 552(a)(2) requires that agencies make available for public inspection and copying "those statements of policy and interpretation which . . . are not published in the Federal Register" as well as "administrative staff manuals and instructions to staff that affect a member of the public."[439]

Since the enactment of this § 552, considerable controversy has developed about when an agency policy statement or interpretative rule is of "general applicability" and should be published in the Federal Register and when making the interpretation or policy statement available for public inspection and copying is sufficient.[440] Several courts have wrestled with this problem and have endeavored specifically to delineate what the term "general applicability" means.[441] In Lewis v. Weinberger,[442] the United States District Court for New Mexico crafted the "significant impact" test to delineate when an interpretative rule or policy statement has the requisite general applicability to be published in the Federal Register.[443] Other courts have subsequently expanded the test.[444] Nevertheless, courts have had great difficulty developing a workable definition of the word "general" in the requirement for publication, leading one commentator to observe:

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[433] 576 F. Supp. 218 (N.D. Cal. 1983).

[434] Id. at 231.

[435] Freedom of Information Act, 81 Stat. 54 (codified as amended at Administrative Procedure Act § 3, 5 U.S.C. § 552 (1982 & Supp. 1985)).

[436] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(D) (1982 & Supp. 1985).

[437] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(B) (1982 & Supp. 1985).

[438] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1) (1982 & Supp. 1985).

[439] Administrative Procedure Act § 3, 5 U.S.C. §§ 552(a)(2)(B) & (C) (1982 & Supp. 1985).

> The best answer . . . is that probably no judge, no administrator, no practitioner, and no commentator knows the answer. Even though the question of what must be published is so highly practical, the meaning of the FOIA on this question remains about as vague after more than a decade as it was when it was enacted.[445]

2. Publication of Medicare Coverage Policy

Medicare beneficiaries and providers have also brought challenges to

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[440] See 1 K. Davis, supra note 347, at § 5.11. Note, The Freedom of Information Act: A Seven Year Assessment, 74 Colum. L. Rev. 895 (1974); Comment, Publication Under the Freedom of Information Act of Statements of General Policy and Interpretations of General Applicability, 47 U. Chi. L. Rev. 351 (1980) [hereinafter Comment, Publication Under the Freedom of Information Act]; see also Comment, A Model for Determining the Requirements of Section 552(a)(1) of the Administrative Procedure Act, 13 U. Mich. J.L. Ref. 515 (1980).

Further, there is evidence that agency compliance with the publication requirements of the Freedom of Information Act across the federal government has not been exemplary. See Government Printing Office, Freedom of Information Act: Noncompliance with Affirmative Disclosure Requirements (1986).

[441] See, e.g., Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977); Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977); Lewis v. Weinberger, 415 F. Supp. 652 (D.N.M. 1976); Tax Analysis & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), modified on other grounds, 505 F.2d 350 (D.C. Cir. 1974); see Comment, Publication Under the Freedom of Information Act supra note 440, at 352-354 (1980); K. Davis, supra note 347, at § 5.11.

[442] 415 F. Supp. 652 (D.N.M. 1976).

[443] See K. Davis, supra note 347, at § 5.11, p. 343-344.

[444] See also Comment, Publication Under the Freedom of Information Act, supra note 440, at 354; K. Davis, supra note 347, at § 5.11; see Saint Francis Memorial Hosp. v. Weinberger, 413 F. Supp. 323 (N.D. Cal. 1976).

[445] K. Davis, supra note 347, at § 5.11.

Medicare coverage policies under § 552 of the APA.[446] In at least one case, Kron v. Schweiker,[447] the United States District Court for the Eastern District of Louisiana ruled that a beneficiary was not bound by a HCFA manual provision regarding definition of a skilled nursing facility for coverage purposes because it had not been published in the Federal Register. Similarly, in Harris v. Hooper, the United States District Court for the District of Connecticut ruled that a bulletin of a HCFA regional office that limited coverage for services in rehabilitation hospitals was not binding because of HCFA's failure to meet § 552 publication requirements.[448]

The question of what publication requirements obtain for national coverage policy under § 552 of the APA is relatively straightforward. Regarding the procedures and criteria for making national coverage policy, it seems inescapable that they fall within the charge of § 552(a)(1)(B) that the "requirements of all formal and informal procedures" be published in the Federal Register.[449] Individual national coverage policies of all types would arguably come within the purview of § 552(a)(1)(D), which requires that "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability" be published in the Federal Register.[450]

C. Suggested Approaches to Effective Promulgation and Publication

The debate over whether the character of Medicare coverage policies mandates promulgation as a rule under § 553 or publication in the Federal Register under § 552 in many ways misses the point. Whether notice-and-comment rulemaking procedures truly provide aged and disabled beneficiaries, as well as the providers that serve these beneficiaries, an effective means of influencing the resolution of medical and other questions associated with the formulation of national coverage policy is questionable. Further, there is question whether publication of policies in the Federal Register really accomplishes the objective of informing all Medicare beneficiaries -- particularly the sick and disabled most in need -- about coverage of the health care services they need.

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[446] See Kron v. Schweiker, [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,136 (E.D. La. Aug. 23, 1982), permanent injunction granted, [1983 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,105 (E.D. La. Sept. 12, 1983); Hooper v. Harris, [1984-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,528 (D. Conn. Sept. 20, 1983), motion for a more specific order granted, [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,619 (D. Conn. May 1, 1985); cf. St. Elizabeth Hosp. v. U.S., 558 F.2d 8 (Ct. Cl. 1977) Chesire Hosp. v. N.H.-Vt. Hospitalization Serv., Inc. [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31,685 (Dec. 30, 1981) (involving § 552 challenges of Medicare reimbursement manual provisions); see also Wilson, Administrative Procedure Act, supra note 322.

[447] [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,136 (E.D. La. Aug. 23, 1982), permanent injunction granted, [1983 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,104 (E.D. La. Sept. 12, 1983).

[448] [1984-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 33,528 (D. Conn. Sept. 20, 1983), motion for a more specific order granted, [1985 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,619 (D. Conn. May 1, 1985).

[449] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(B) (1982 & Supp. 1985).

[450] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(D) (1982).

The real issue is how to establish a promulgation process that allows for appropriate input from beneficiaries, providers and other affected parties, and how to establish a publication process that ensures that beneficiaries and providers are adequately informed about coverage policy so as to conform, respectively, their expectations about benefits and their care of Medicare beneficiaries accordingly. Whether the APA promulgation and publication procedures are really designed to accomplish these objectives in the case of Medicare coverage policy is, as indicated above, open to question.

The issue with respect to beneficiaries -- the most important group about which to be concerned in view of the fact that only beneficiaries have a constitutionally protected interest in Medicare benefits[451] -- is complex. First of all, most Medicare coverage policy involves primarily medical questions beyond the expertise of Medicare beneficiaries.[452] Thus, it is doubtful how much real influence individual Medicare beneficiaries can really have in the formulation of Medicare coverage policy even if they have notice and an opportunity to comment. Their advocacy groups, at best, can only assure that appropriate medical input is provided in the policymaking process.

Publication is a similarly complex issue. Clearly most beneficiaries are not devotees of the Federal Register, so even the most rigorous publication requirements under § 552 would not guarantee that individual beneficiaries have the requisite information about coverage of Medicare benefits to govern their decisions about obtaining health care services.[453] Furthermore, even armed with general information about Medicare coverage policies, beneficiaries are not in final control of the benefits that are actually provided to them when they obtain services for illness or injury; rather physicians and other providers make such decisions.[454] Likewise, individual physicians are not devoted readers of the Federal Register.

But clearly any requirement imposed on the policymaking process must assure the desired results without impeding the formulation of coverage policy in an efficient, inexpensive and timely fashion. It has been demonstrated that § 553 notice-and-comment rulemaking procedures are both time and resource consuming processes. It often takes an estimated six months to a year for most agencies to promulgate legislative rules under this process.[455] Many commentators have opposed the adoption of notice-and-comment rulemaking procedures for interpretative and other exempt rules on grounds that such requirements would effectively inhibit agencies from clarifying statutory language or publicly stating agency policy on future interpretation of statutory provisions.[456] It is conceivable that requiring HCFA to promulgate all national coverage policy under § 553 notice-and-comment rulemaking procedures would inhibit HCFA's making national coverage policy and leave coverage policymaking strictly to Medicare contractors. This result would be directly contrary to the expressed desires of many commentators to the April 29th Notice.[457]

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[451] See O'Bannon v. Town Court Nursing Home, 447 U.S. 773 (1980); Gray Panthers v. Schweiker, 652 F.2d 146 (D.C.Cir. 1980).

[452] See supra notes 27-46 and accompanying text.

[453] The problem of communicating information about benefits, coverage and other matters regarding the Medicare program to beneficiaries is a difficult problem about which HCFA, Congress and the courts have exhibited concern. See Kinney, supra note 8, at 133.

[454] Telephone interview with Sally Hart Wilson, supra note 219.

[455] Asimow, Nonlegislative Rules, supra note 363, at 530.

Nevertheless, the Medicare coverage policymaking process should still comport with the general promulgation and publication requirements of the APA and result in policies that can withstand subsequent attack and invalidation upon judicial review for failure to comply with the APA. Although Congress sought to insulate national coverage determinations in the Omnibus Budget Reconciliation Act of 1986,[458] it does seem that more artful ways exist for ensuring judicial approval of the Medicare coverage policymaking process than bluntly cutting off the right to challenge the process because it fails to comply with extant legal requirements.

In other areas of administrative law similar concerns have surfaced about forging a policy promulgation process that is fair to affected parties but can withstand challenges under § 552 and § 553 of the APA. What has emerged in administrative law scholarship, often through the leadership of the Administrative Conference of the United States, is examination of new approaches to policymaking that ensure proper promulgation and publication procedures under the APA, but also facilitate meaningful input into the formulation of policy by affected parties as well as genuinely effective publication of that policy to affected parties. Some of these approaches also endeavor to obtain the cooperation of the affected parties in formulating policy with a view toward their embracing the policy or at least accepting the policy and foregoing subsequent judicial challenge.

Post-Adoption Publication. In 1976, the Administrative Conference of the United States concluded that, at best, it is difficult to distinguish between legislative rules and interpretative rules or policy statements and that the legal effect test as well as the substantial impact test are not successful means for accomplishing this distinction.[459] The Conference adopted a recommendation that agencies publish all interpretive rules of general applicability before promulgation and, if unfeasible, publish such rules and policy statements post-adoption to permit public comment irrespective of the requirements of the APA.[460] Clearly HCFA would be well advised to publish its national coverage policies in the Federal Register following promulgation in order to obtain comments regarding the medical validity of their decisions as well as beneficiary concerns about the practical implications of the policy.

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[456] See supra note 361.

[457] See supra note 326 and accompanying text.

[458] See supra notes 125, 128-132 and accompanying text.

[459] Admin. Conference of U.S., Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1987); see Asimow, Public Participation, supra note 363, at 573.

[460] Admin. Conference of U. S., Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5 (1987); see Asimow, Public Participation, supra note 363, at 578-584.

But post-adoption publication does not address the entire problem with the Medicare policymaking process and particularly the problem of beneficiaries in learning about national coverage policies that affect their medical care. More creative approaches are needed. Active involvement of all interested parties in the formulation of Medicare coverage policy at the national as well as local level, in a public and accessible fashion, is an essential feature of such a process. Publication in a fashion that identifies all Medicare coverage policy and is genuinely accessible to Medicare beneficiaries and providers is also necessary.

Negotiated Rulemaking. One approach to rulemaking that could well inform the Medicare coverage policymaking process is negotiated rulemaking. The concept of negotiated rulemaking involves convening the major interests affected by a proposed regulation, before the agency issues a proposed rule, and endeavoring to engage interested parties in a negotiation process that develops a consensus on an acceptable rule that accommodates all legitimate concerns.[461] Under negotiated rulemaking, which has been used successfully in a number of contexts,[462] affected parties actively participate in the formulation of the rule. The parties do not just submit comments on a proposed rule but actually negotiate the contents of the draft rule with the agency in a dialogue directed by a mediator.[463] The Administrative Conference[464] and other commentators[465] perceive negotiated rulemaking as a positive alternative to the protracted litigation that often follows informal rulemaking under § 553 of the APA where parties have not been so intimately involved with the rulemaking process.[466]

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[461] Breger, *Thoughts on Accountability and the Administrative Process*, 39 *Admin. L. Rev.* 399, 413 (1987); *see* Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 *Geo. L. J.* 1625 (1986); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *Yale J. on Reg.* 133 (1985); Popper, *An Administrative Law Perspective on Consensual Decisionmaking*, 35 *Admin. L. Rev.* 255 (1983); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1 (1982) [hereinafter Harter, *A Cure for Malaise*]; Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 *Harv. L. Rev.* 1871 (1981); *see also* Reich, *Regulation by Confrontation or Negotiation?*, 59 *Harv. Business Rev.* 82 (1981); Schuck, *Litigation, Bargaining, and Regulation*, 3 *Regulation* 26 (1979).

[462] See Harter, *Regulatory Negotiation: The Experience So Far*, *Resolve*, Winter 1984, at 1; Perritt, *supra* note 461.

[463] *See* Harter, *A Cure for Malaise*, *supra* note 461; Popper, *supra* note 461; Susskind & McMahon, *supra* note 461; Perritt, *supra* note 461.

[464] Admin. Conference of U.S., Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.82-4 (1987); Admin. Conference of the U.S., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.85-5 (1987). *See* Harter, *A Cure for Malaise*, *supra* note 461; Perritt, *supra* note 461.

[465] *See, e.g.*, Susskind & McMahon, *supra* note 461; Popper, *supra* note 461; Schuck, *supra* note 461.

Although designed chiefly for legislative rulemaking, the negotiated rulemaking concept has much to offer the HCFA policymaking process for all types of national coverage policy.[467] The interested parties in Medicare coverage issues, beneficiaries and providers in particular, could be convened in a structured discussion prior to promulgation of major national coverage policies. HCFA should be an active participant in such a discussion. It alone is fiscally responsible for the Medicare program and thus has the objective, not shared by beneficiaries, providers or other affected groups, of containing program costs. Also, unlike the conventional regulatory agencies and regulated industries, HCFA, as the major payer for health care services,[468] is an active participant in the health care industry. However, negotiated regulation theorists caution that there must be a reasonable expectation that the agency will implement the negotiated rule to ensure continued participation of parties in such negotiation processes.[469]

Such an approach could serve the extraordinarily useful function of ensuring that Medicare coverage polices are properly informed by good medical practices and also that provider groups not only acquiesce in, but even concur with, the coverage policy. This might serve as an impetus for provider groups to educate their members about Medicare coverage policy and its rationale and encourage providers to conform their treatment of Medicare beneficiaries accordingly and thereby diminish beneficiaries' exposure to financial liability for uncovered services. Further, the negotiation process might force beneficiaries as well as providers to confront cost problems posed by excess utilization of services and encourage providers to identify ways to practice more efficiently and beneficiaries to use services in a more cost effective manner. This approach would also be consistent with objectives of ensuring public participation in agency policymaking as a general principle to ensure more agency accountability for policy and exercise of discretion in implementing broad statutory mandates.[470] At the very least, it should improve relations between HCFA, beneficiaries and providers and thus reduce the incidence of protracted litigation over HCFA coverage policy.

Other Reforms. Irrespective of whether HCFA borrows from the negotiated rulemaking concept to reform the Medicare coverage policymaking process, there are other important reforms that could be implemented to improve the process. The policymaking process needs to be made more regular, public and expeditious--reforms which could easily be accomplished without HCFA's incurring additional costs. Further, the criteria for making all Medicare coverage policy, including that made by Medicare contractors, must be identified and publicized. HCFA has already recognized these needs in its plans to promulgate a rule under the notice-and-comment rulemaking procedures of § 553 delineating the procedures and criteria for making national coverage determinations.[471]

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[466] See supra note 461.

[467] See Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975) (This author recommends a comparable negotiation for agency policies that are not promulgated as legislative rules); see also Crampton, The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. L. J. 525 (1972); Sinaiko, Due Process Rights of Participation in Administrative Rulemaking, 63 Cal. L. Rev. 886 (1975); Comment, Public Participation in Federal Administrative Proceedings, 120 U. Pa. L. Rev. 702 (1971).

[468] The Medicare program pays 17% of all health care expenditures. National Health Expenditures, 1985, supra note 2, at 8.

[469] See supra note 363.

[470] See Stewart, supra note 467.

For policies involving questions about new or questionable technologies that are referred to OHTA for a full assessment, the notice-and-comment procedures are quite extensive and, as a practical matter, probably meet the § 553 notice-and-comment rulemaking requirements except in one major respect. OHTA does not publish its proposed coverage recommendations in the Federal Register before HCFA acts on recommendations and makes a final national coverage determination. HCFA and OHTA should reconsider this practice as it precludes the opportunity of affected parties to comment on the recommendation before policy is made. The other major criticisms of OHTA's technology assessment process concern technical issues of OHTA's technology assessment methodologies and whether OHTA's assessments are duplicative of other federally sponsored assessments.

For national coverage determinations for medical technologies and procedures referred to the HCFA Physicians Panel only, an opportunity for parties to express their views to the panel in a regular and public process is needed. HCFA could release a notice of a public meeting of the panel with a brief agenda in the Federal Register. Because HCFA does not always know what items will be discussed at the HCFA Physicians Panel until shortly before a meeting, interested parties could have the obligation of obtaining the specific agenda items from HCFA as the meeting date approached.

For policies not involving complex medical decisions, as is the case with most policies concerning durable medical equipment used by the disabled and handicapped and other types of national coverage policy, there is a need for identification of the decisionmakers within HCFA as well as a means for public input into the formulation of this type of coverage policy. It should be emphasized that this type of coverage policy affects far more people than those 20 to 30 policies a year concerning new or questionable technologies, and thus the procedures for making and publicizing these decisions are of critical importance. Because the policymaking process regarding this type of coverage issue is diffuse and not structured like that for new technologies, i.e., with referral to the HCFA Physicians Panel or OHTA, it is difficult to conceptualize an efficient approach for getting public input before promulgation of these policies.

To address this problem as well as to identify concerns and problems with all coverage policies as soon as possible, publication of all coverage policies in the Federal Register after promulgation pursuant to Recommendation 76-5 of the Administrative Conference of the United States on post-adoption publication would be useful.[472] This process would function as an administrative reconsideration process for which the health equipment manufacturers in particular and others have pressed.[473]

Finally, it is critical that HCFA develop a publication system for national coverage policy of all types that is genuinely accessible to Medicare beneficiaries. HCFA should endeavor to identify all national policies affecting coverage of Medicare benefits in one index and in a form that is accessible to Medicare beneficiaries.[474] HCFA now organizes its policies and instructions on all matters in manuals addressed to Medicare contractors and providers. There is no comparable manual for beneficiaries nor an index that would enable beneficiaries to find applicable coverage policy in other manuals. Thus, to determine coverage of Medicare benefits in a given case, beneficiaries and providers would have to look through the maze of HCFA manuals to find the governing coverage policy.

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[471] April 29th Notice, 52 Fed. Reg. 15,560 (1987).

[472] See supra notes 459-460 and accompanying text.

[473] See supra notes 260-261 and accompanying text.

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[474] One commentator has suggested that a solution to this publication problem might be as simple as contracting with a commercial enterprise such as Commerce Clearinghouse to publish Medicare program policies and that HCFA create a central process by which all policies affecting Medicare beneficiaries would be identified. Letter from Professor Maxwell J. Mehlman, Case Western Reserve University School of Law, to Jeffrey Lubbers, Research Director, Administrative Conference of the United States (Oct. 22, 1987).

V. ADMINISTRATIVE AND JUDICIAL REVIEW

This section examines the current procedures for administrative and judicial review of national coverage policies and their application in the cases of individual beneficiaries. This analysis focuses primarily on the critical issues raised by the limits on the administrative and judicial review of national coverage determinations that Congress imposed in the Omnibus Budget Reconciliation Act of 1986,[475] as well as on specific issues regarding administrative and judicial review of national coverage policy raised in the comments to the April 29th Notice[476] and the Medicare appeals study of the Administrative Conference of the United States.[477]

The chief issue in this examination is what do current principles of administrative and constitutional law require regarding opportunities for affected parties to challenge Medicare coverage policy through administrative and judicial review. In particular, do the restrictions on administrative and judicial review of national coverage policy in the Omnibus Budget Reconciliation Act[478] comport with requirements of procedural due process.

This section will not consider the general question of whether current administrative and judicial review procedures by which beneficiaries and other affected parties can challenge coverage policy for failure to meet procedural due process requirements. The Supreme Court and several lower courts have upheld the constitutionality of the basic structure of administrative and judicial review of Medicare coverage and payment disputes, even before the Omnibus Budget Reconciliation Act of 1986[479] extended administrative and judicial review to Part B claims.[480] Furthermore, in 1986, the Administrative Conference of the United

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[475] Omnibus Budget Reconciliation Act of 1986 § 9341(a)(1)(D) (to be codified in Social Security Act § 1869, 42 U.S.C. § 1395ff). See supra note 125.

[476] See supra notes 204-265 and accompanying text.

[477] See supra notes 8-11 and accompanying text.

[478] See supra notes 123-134 and accompanying text.

[479] Omnibus Budget Reconciliation Act of 1986 § 9341(a)(1)(D) (to be codified at Social Security Act §1869, 42 U.S.C. § 1395ff).

[480] See, e.g., U. S. v. Erika, Inc., 456 U.S. 201 (1982); Schweiker v. McClure, 456 U.S. 188 (1982); Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980), rev'g and remanding sub nom., Gray Panthers v. Califano, 466 F. Supp. 1317 (D.D.C. 1979), reh'g on remand sub nom., [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,144 (D.D.C. Sept. 10, 1982); Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983), remanding sub nom., Gray Panthers v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,981 (D.D.C. Nov. 4, 1985) (approved parties' stipulation regarding Part B claims under $100), [1986-1 Transfer Binder] Medicare & Medicaid Guide ¶ 35,140 (D.D.C. Feb. 14, 1986) (ruled that oral hearings are not required for Part A claims under $100). In the Gray Panthers litigation, the United States Court of Appeals for the District of Columbia Circuit required additional procedural protections for beneficiaries in cases of disputed claims of less than $100 under Part A and Part B of the Medicare program.

States examined the Medicare appeals system for coverage and payment disputes and made comprehensive recommendations.[481]

A. Administrative Review

There are two major issues regarding administrative review of national coverage policy: (1) restrictions on the authority of ALJs to review Medicare coverage policy in beneficiary appeals; and (2) lack of opportunity for interested parties other than beneficiaries to challenge Medicare coverage policy administratively. The first issue is of critical concern to beneficiaries seeking to challenge application of national coverage policies in determining what services the Medicare program paid for in their own cases. The second issue is of greatest interest to groups representing beneficiaries, providers and health equipment manufacturers who may want to modify or reverse a national coverage policy at the time of promulgation. Indeed, the greatest pressure for such an expanded administrative reconsideration and appeal process for national coverage policies upon promulgation has come from health equipment manufacturers.

With its decision Goldberg v. Kelly[482] in 1970, the Supreme Court clearly established that beneficiaries of a government benefit program, whose program benefits are adversely affected by an action of an administrative agency, have a right under the procedural due process clauses of the fifth and fourteenth amendments to notice of the agency action and a hearing to challenge the merits of the agency action. This decision precipitated what has been called a "due process explosion" in which courts have recognized a right to notice and hearing regarding a wide variety of agency actions affecting beneficiaries of federal and state social welfare programs.[483]

Since 1970, the Supreme Court, lower courts and scholars have wrestled with the enormous financial and other implications of a judicial model of evidentiary hearings that the Supreme Court appeared to embrace in Goldberg v. Kelly.[484] Soon after the Goldberg decision, it became evident to many observers, including the Supreme Court,[485] that requiring evidentiary hearings for all beneficiary disputes with government benefit programs was both extremely costly for increasingly constrained social program budgets and often ineffective in achieving the desired fairness for these beneficiaries.[486]

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[481] See supra note 8 and accompanying text.

[482] 397 U.S. 254 (1970).

[483] Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975); see also J. Mashaw, Due Process in an Administrative State (1985).

[484] See, e.g., Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Goss v. Lopez, 419 U.S. 565 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976); Califano v. Yamasaki, 442 U.S. 682 (1979); Barry v. Barchi, 443 U.S. 55 (1979); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), Schweiker v. McClure, 456 U.S. 188 (1982); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

While the Supreme Court did not require a full evidentiary hearing prior to the termination of welfare benefits for welfare beneficiaries, the specific features that the court envisioned as meeting the requirements of the concept of due process of law, i.e., right to an oral hearing and cross-examination of witnesses, counsel, decision based on evidence adduced at the hearing, and a record of the hearing, amounted basically to a requirement for an evidentiary hearing. Goldberg v. Kelly, 397 U.S. at 1021-1022.

In Mathews v. Eldridge,[487] the Supreme Court departed from the Goldberg approach and crafted the current formula for assessing procedural due process in social welfare cases. The Court required the claim to be assessed in terms of three factors: (1) the private interests at stake; (2) the fairness and reliability of existing procedures, including the risk of erroneous deprivation and the benefit of additional safeguards; and (3) the public (government) interest at stake, including the financial and social costs of additional safeguards.[488] Although this analytical approach has effectively organized the inquiry about whether government notice and hearing procedures in a given instance comport with procedural due process requirements, it has not necessarily imposed consistency in judicial decisions on the requirements of procedural due process in social welfare cases.[489] It has also been criticized as promoting utility and accuracy of decisionmaking at the expense of other values that procedural due process ought to promote as well.[490]

An astute scholar of procedural due process, Professor Jerry Mashaw, observed that the adjudicative model for hearings for social welfare programs unexpectedly transformed social welfare programs from "avowedly paternalistic, discretionary, and individualized" programs into "semiadversary, impersonal, property-rights regimes"[491] and forced agencies to find ways to make defensible decisions regarding benefits through more specific rules applied across the board.[492] Agencies were also forced to limit the discretion of agency decisionmakers in making decisions that reflected the specific needs of individual beneficiaries.[493] This seems to have occurred in the case of HCFA and national coverage policy since the inception of the Medicare program in 1965. Also several prominent scholars are concerned that the procedural due process concept remain expansive enough to provide beneficiaries with a sense that they had been treated with dignity and fairness in contesting agency actions, and that notice and particularly hearing procedures did not just meet more narrow objectives of ensuring accuracy of decisions and administrative efficiency.[494]

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[485] See infra notes 487-488 and accompanying text.

[486] See Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims, 59 Cornell L. Rev. 772 (1974); Van Alstyne, Cracks in the "New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977).

[487] 424 U.S. 319 (1976).

[488] Id.

[489] An excellent example of how another court, using the same analytical approach but coming from different political and philosophical perspectives, reached a very different conclusion regarding what due process requires in a social welfare case than the result in Mathews v. Eldridge would suggest. In Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980), involving Medicare beneficiary appeals of claims under $100, the United States Court of Appeals for the District of Columbia found that the interest of Medicare beneficiaries with such claims was sufficient to require a simple oral hearing on grounds that HCFA's procedures did not contain the requisite safeguards to protect the core requirements of due process and the costs imposed on the Medicare to make reforms, i.e., providing limited oral hearings, were justified.

[490] See Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976); see also Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. Pa. L. Rev. 111, 119 (1978).

1. Restrictions on ALJ Review of National Coverage Determinations

The critical question is whether the prohibition in the Omnibus Budget Reconciliation Act of 1986 against ALJs reviewing national coverage determinations compromises both beneficiary and provider rights to procedural due process in challenges to coverage and payment decisions based on national coverage determinations.[495] The chief complaint about this restriction is that it limits, if not eliminates, the opportunity for beneficiaries to achieve effective administrative review of coverage policies that are applied in determining benefits in their individual cases. HCFA maintains that this prohibition is necessary because ALJs do not have the requisite medical expertise to assess the validity of these policies, which are based on medical judgments.[496]

The nature of national coverage policies of all types contributes to this situation in a unique fashion. As discussed above, national coverage policies are usually stated as flat prohibitions against coverage of an item or procedure and do not generally provide for exceptions in the application of the policy. Thus, the posture of the beneficiary in challenging the application of a coverage policy in a particular case is generally not the factual question of whether the policy is appropriately applied in the given case, but whether the policy itself is appropriate from a medical perspective or valid as a matter of law. Consistent with Professor Mashaw's observation, national coverage policy is characteristic of specific rules applied across the board with the aim of creating uniform and defensible decisions.[497]

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[491] J. Mashaw, Due Process in the Administrative State, 34 (1985).

[492] Id., at 31-41.

[493] Id.

[494] See generally, Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U.L. Rev. 885 (1981); Saphire, supra note 490; see also Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

[495] This prohibition is actually a codification of a similar prescription for Part B hearing officers of carriers in 42 C.F.R. § 405.860 (1986).

[496] Telephone interview with Barton McCann, M.D., supra note 56; see also H.R. Rep. No. 1012, 99th Cong. 2d Sess. 350-351 (1986). See supra notes 131-132 and accompanying text.

One case, Leduc v. Harris,[498] has addressed the constitutionality of similar restrictions in HCFA regulations with respect to Part B hearing procedures before Medicare carriers.[499] This case involved a national coverage policy regarding coverage of "Amigo" wheelchairs which HCFA claimed were not covered durable medical equipment because they are not used primarily by ill or injured people.[500] The United States District Court for Massachusetts concluded, in denying HHS' motion to dismiss for lack of federal question jurisdiction, that the hearing procedures violated procedural due process requirements because of the restrictions on the authority of the hearing officer to consider the validity of the challenged coverage policy. The court stated:

> The hearing officer rejected [plaintiff's] claim on the basis that she was bound by the Health Care Financing Administration's "policy" to refuse reimbursement for "Amigo" electric wheelchairs. The hearing officer also specifically found that the plaintiff . . . required an electric wheelchair and that the "Amigo" is "more efficient, practical, and economical than the standard electrical power model wheelchair." She further held that under Sec. 12013.7 of the Medicare Guidelines she was bound by the "policy" of the Health Care Financing Administration. . . . When one of the crucial issues in the granting of benefits was thus foreclosed by unilateral action of the Health Care Financing Administration, there was no fair hearing. In the circumstances of this case this is a violation of due process.[501]

The statutory restriction imposed by the Omnibus Budget Reconciliation Act of 1986 on ALJ consideration of national coverage policy is qualitatively different from restrictions imposed on decisionmakers of Medicare contractors through regulations or program instructions.[502] The question becomes one of congressional authority to legislate rather than agency authority to regulate. Nevertheless, the same constitutional considerations obtain with respect to the congressional enactment, i.e., can a beneficiary still get a fair hearing in an adjudication of his right to a benefit if Congress has restricted the ability of the hearing officer to adjudicate the agency's policy or statutory interpretation delineating the benefit? Although only one case has found a procedural due process violation with respect to limitations on the decisionmaking authority of administrative hearing officers, the case is instructive and arguably an indicator of how other courts, which are now being confronted with challenges to national coverage determinations for the first time since the inception of the Medicare program,[503] might perceive this limitation with respect to policies that have not been promulgated according to a public process.

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[497] See supra notes 491-494 and accompanying text.

[498] 488 F. Supp. 588 (D. Mass. 1980).

[499] See supra note 495 and accompanying text. See also Linoz v. Heckler, 800 F.2d 871 (9th Cir. 1986); Hatcher v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,989 (8th Cir. Sept. 4, 1985). In Hatcher the Eighth Circuit refused to hear a similar challenge that HCFA policy binding hearing officers to HCFA coverage policies violated beneficiaries due process rights. The basis for this refusal was that the court did not have federal question jurisdiction because of the statutory bar in § 204(h) of the Social Security Act. 42 U.S.C. § 405(h) (1982 & Supp. 1985). In Linoz the court did not reach this issue.

[500] 488 F. Supp. at 590. The court noted HCFA's reliance on Health Care Fin. Admin., Medicare Carriers Manual § 2100.1 (1987), which defines covered durable medical equipment. See supra note 45.

[501] 488 F. Supp. at 590.

Although the prohibition is legal, it is questionable whether the prohibition makes good sense from a policy perspective. Because of the character of most national coverage policy -- highly specific, categorical and incorporating no exceptions for its application -- it would seem desirable to have an appeals process that allowed for the full administrative consideration of the coverage policy as soon as possible and before judicial review. This would also facilitate expeditious disposition of challenges over national coverage determinations without resort to court. Under the present arrangement, a final decision on the merits of a national coverage determination cannot be obtained until judicial review and then only after the court has remanded the issue of the policy's validity to HHS for amplification of the record.[504] A beneficiary seeking an adjudication has no choice but to proceed to court.

The scholarship on the goals of procedural due process[505] has much to inform the analysis of administrative review issues regarding Medicare national coverage policy. The important theme of this scholarship is that an administrative hearing process should allow beneficiaries to come away from the proceeding feeling that their concerns have been ventilated and justice has been served, regardless of the decision on the merits. It would seem that these values would be compromised in administrative review of Medicare coverage policies because of the limitations imposed by the Omnibus Budget Reconciliation Act of 1986. Specifically, limiting the opportunities for beneficiaries to challenge the validity of a coverage policy on the merits at the administrative hearing level, in proceedings in which the ALJ has no authority to consider the central issue, makes it less likely that beneficiaries will conclude that they have had a full and fair hearing. Rather they may conclude that, given the ALJ's diminished authority, they have been engaged in a wasted exercise in which the cards have been stacked against them.

2. Administrative Reconsideration of National Coverage Policy

As noted above, some critics of the Medicare coverage policymaking process, namely health equipment manufacturers, are especially concerned that there is no opportunity for invoking reconsideration or appeal of national coverage determinations and other types of national coverage policy for other parties affected by national coverage policy. Yet HCFA has opposed providing an opportunity for mandatory administrative reconsideration or administrative review before an ALJ for any dissatisfied party, except beneficiaries who already possess this right by statute,[506] because of concerns that HCFA would be subjected to strong political pressure to reconsider its coverage policies.[507] In light of this agency opposition, the question is whether, under the requirements of procedural due process, HHS must provide an opportunity for administrative reconsideration and even administrative appeal to ALJs of national coverage policy to beneficiaries, providers, medical equipment manufacturers or other affected parties.

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[502] See supra note 495 and accompanying text.

[503] See supra notes 292-295 and accompanying text.

[504] See supra notes 125, 133-134 and accompanying text.

[505] See supra notes 125, 133-134 and accompanying text.

The APA does not require that an agency provide an opportunity for dissatisfied parties, even those directly affected, to seek administrative reconsideration of rules or even policy statements. Section 553(e) of the APA, however, does require that each agency give an interested person the right to petition for the issuance, amendment, or repeal of any rule including interpretative rules and policy statements.[508] The Supreme Court has also ruled that only beneficiaries, and not even the providers who serve beneficiaries and who thus have substantial financial interests at stake, have a constitutionally protected interest in federal health insurance programs.[509] Furthermore, reconsideration is generally afforded only to parties in adjudicative proceedings before agencies. Even in the context of adjudication, the Supreme Court has concluded that a private litigant with a constitutionally protected interest at stake does not have a right, as a matter of procedural due process, to obtain reconsideration of an order.[510]

Thus, the question becomes one of whether it would be desirable as a matter of policy to require HHS to have a mandatory reconsideration process for national coverage policies. If national coverage policies are only interpretative rules or policy statements for which notice-and-comment rulemaking under § 553 is not required, and if the procedures adopted for promulgating national coverage policies offer little opportunity for public input in the promulgation process, then the case for a mandatory reconsideration process is stronger. Further, such a process may provide HCFA with an opportunity to check the appropriateness of its decisions on coverage policy. On the other hand, a more public promulgation process or some type of negotiated rulemaking process which allows for earlier public input from interested parties would mitigate the need for such a mandatory reconsideration process.[511]

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[506] See Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 & Supp. 1985).

[507] See supra notes 330-333 and accompanying text.

[508] Administrative Procedure Act § 4(d), 5 U.S.C. § 553(e) (1982 & Supp. 1985).

[509] See, e.g., O'Bannon v. Town Court Nursing Home, 447 U.S. 773 (1982); St. Francis Hosp. Center v. Heckler, 714 F.2d 872 (7th Cir. 1983), cert. denied, 465 U.S. 1022 (1984); Geriatrics, Inc. v. Harris, 640 F.2d 262 (10th Cir.), cert. denied, 454 U.S. 832 (1981).

[510] See, e.g., Northeast Broadcasting, Inc. v. FCC, 400 F.2d 749 (D.C. Cir. 1968); U.S. v. Pierce Auto Freight Lines, Inc. 327 U.S. 515, 535 (1945); ICC v. City of Jersey City, 322 U.S. 503, 514-515 (1944).

Post-adoption publication of interpretative rules of general applicability pursuant to Recommendation 76-5 of the Administrative Conference of the United States[512] could well serve as an effective alternative to a mandatory reconsideration process for national coverage determinations and other types of national coverage policies. At least, post-adoption publication could provide the agenda for HCFA's reconsideration of policies by identifying policies over which there is considerable controversy as reflected in post-adoption comments. This approach would also provide a useful and efficient means for interested parties to make their views about controversial coverage policies known to HCFA, without subjecting HCFA to excessive political pressure and without establishing another formal agency procedure with all the attendant trappings of staff and resources.

The concerns of health equipment manufacturers that current procedures provide no opportunity for parties, other than beneficiaries and providers, to appeal national coverage determinations to an ALJ are troubling. Clearly, this limitation prevents health equipment manufacturers from challenging adverse national coverage determinations affecting their products and resulting in severe economic hardship on their business.[513] This result can be devastating to a small manufacturer and is serious for all manufacturers. Nevertheless, it does not seem appropriate to establish a process that allows health equipment manufacturers, rather than program beneficiaries with support of their providers, to drive administrative review of national coverage determinations affecting medical equipment and new technologies. Certainly the requirements of procedural due process would recognize no obligation of this nature.[514] Furthermore, such national coverage determinations would generally involve technical judgments outside the orbit of expertise of the ALJs that currently hear Medicare appeals.

B. Judicial Review

Since the 1960s, when agencies began to use legislative rulemaking extensively,[515] judicial review of agency regulations and particularly agency procedures generating regulations has been controversial.[516] In brief, courts and Congress, on the basis of procedural due process and other grounds, had imposed more required procedures on agencies for their informal rulemaking proceedings in addition to those imposed under the APA.[517] However, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,[518] the Supreme Court conclusively curtailed the authority of courts to impose additional requirements for rulemaking proceedings over and above the requirements Congress imposed in the APA or the agency's enabling act. The result of this decision was to leave to Congress the primary role of delineating the procedures by which agencies make regulations and policy.[519] Another result of this decision was to limit the protective oversight of procedural due process in agency rulemaking proceedings in a fashion described aptly by two renowned scholars:

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[511] See supra notes 459-470 and accompanying text.

[512] See supra notes 460-461 and accompanying text.

[513] HIMA Recommendations, supra note 246. Letter from Frank E. Samuel, Jr. supra note 246.

[514] See O'Bannon v. Town Court Nursing Home, 447 U.S. 773 (1980). In this decision, the Supreme Court clarified that the only entitlement interest protected in federal health insurance programs was the right of the beneficiaries to specified benefits.

[515] Gellhorn & Robinson, Rulemaking "Due Process": An Inconclusive Dialogue, 48 U. Chi. L. Rev. 201, 202-203 (1981).

> Thus the judicial examination and imposition of procedural requirements may have peaked, but it has raised questions about the basic character of agency rulemaking and of rulemaking "due process" that have yet to be answered. Although due process has always been a concern lurking in the background of rulemaking authority and rulemaking procedure, attention has not been sharply focused on the issue. This previous lack of concern may be explained by the existence of other safeguards. Agency rules are not self-enforcing, [citations omitted] preenforcement judicial review is available, [citations omitted] and the necessity of enforcing agency rules through adjudication provides those affected by rulemaking both with notice and with an opportunity to be heard by an impartial tribunal prior to the imposition of any sanction.[520]

The two major restrictions on the judicial review of Medicare coverage policy that Congress imposed in the Omnibus Budget Reconciliation Act of 1986,[521] in light of other characteristics of the current procedures for making and publicizing Medicare coverage policy as well as restrictions on administrative reconsideration and appeal of Medicare coverage policy, do raise questions of whether beneficiaries are accorded procedural due process in the current provisions for judicial review of Medicare coverage policy. The two restrictions on judicial review in question are mandatory remand of judicially-challenged national coverage determinations to HCFA and the restriction of judicial authority to invalidate national coverage determinations for failure to comply with Chapter 5 of the APA regarding publication in the Federal Register or providing an opportunity for public comment.[522]

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[516] See A Guide to Federal Agency Rulemaking, supra note 347, at 1-8; K. Davis, supra note 347 §§ 6.35-6.37; cf. Hamilton, Procedures for the Adoption of Rules of General Application: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276 (1972).

[517] See, e.g., Gellhorn & Robinson, supra note 515, at 203; Morrison, The Administrative Procedure Act: A Living Responsive Law, 72 Va. L. Rev. 253, 254-268 (1986); A Guide to Federal Agency Rulemaking, supra note 347, at 1-8;

[518] 435 U.S. 519 (1978).

[519] See, e.g., Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345; Verkuil, Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II, 55 Tul. L. Rev. 418 (1981); Davis, Administrative Common Law and the Vermont Yankee Opinion, 1980 Utah L. Rev. 3; cf. Howarth, Informal Agency Rulemaking and the Courts: A Theory for Procedural Review, 61 Wash. U.L.Q. 891 (1984).

[520] Gellhorn & Robinson, supra note 515, at 204.

1. Mandatory Remand of National Coverage Determinations

The Omnibus Budget Reconciliation Act of 1986 specifically requires a court that is considering invalidating a national coverage determination to remand the question of its validity to HHS for further amplification of the record. This requirement is essentially a statutory invocation of the doctrine of primary jurisdiction and raises two important issues. First, is this an appropriate invocation of the doctrine of primary jurisdiction, particularly in view of the fact that initial consideration of the validity of the national coverage determination on the merits will be delayed? Second, do these mandatory remand procedures compromise the rights of beneficiaries to procedural due process in challenges to coverage and payment decisions based on national coverage determinations? The overriding factor in resolving these issues is the fact that neither the current promulgation process nor procedures for administrative review accord beneficiaries or other parties any meaningful opportunity to challenge a national coverage determination generally or the application of a national coverage determination in a specific case.

Under the judicially-conceived doctrine of primary jurisdiction, courts may postpone assuming jurisdiction over an issue or case in which an agency has concurrent jurisdiction "whenever enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body."[523] The doctrine is generally invoked when the issue involved concerns a technical issue for which the "expert and specialized" knowledge of the agency would be helpful for resolution.[524] The other, more important, reason for invoking the doctrine, and one of great interest to Congress in requiring remand of national coverage determination to HCFA, is to promote the "uniform and expert administration of the regulatory scheme."[525] Further, on several occasions, as in the case of national coverage determinations, Congress has successfully required invocation of the doctrine of primary jurisdiction by statute in a few situations.[526]

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[521] See supra notes 125, 127-134 and accompanying text.

[522] See supra note 125.

[523] U.S. v. Western Pacific R.R., 352 U.S. 59, 64 (1956). See K. Davis, supra note 347, at § 22.1; B. Schwartz, supra note 252, § 8.26.

[524] U.S. v. Western Pacific R.R. 352 U.S. 59, 64 (1956).

[525] Id.

Clearly, disputes over national coverage policy, with its medical character and importance to the proper functioning of the Medicare program, are appropriate candidates for invoking the doctrine of primary jurisdiction. However, there is still question about whether such invocation is appropriate, in light of the virtual dearth of opportunities for beneficiaries and other affected parties to challenge Medicare coverage policy, and given the fact that invocation of the doctrine of primary jurisdiction invariably delays the ultimate disposition of the case. To tell a beneficiary, who has pursued a challenge all the way to federal court, that he must wait still longer for a decision on the merits, until after HCFA has had an opportunity to justify its coverage policy in the record, seems frankly unfair.

Justice Douglas' observation in Ricci v. Chicago Mercantile Exchange[527] about the operation of the primary jurisdiction doctrine is particularly apt in the case of Medicare beneficiaries. He stated that, when this doctrine is invoked, the "road" that the litigant is "required to travel to obtain justice is . . . long and expensive and available only to those with long purses . . ."[528] Medicare beneficiaries have "short purses" generally. They are less economically and physically well off compared to other Americans. Aged beneficiaries, for example, had an average annual income in 1982 of $11,000.[529] Furthermore, Medicare beneficiaries -- who are aged and disabled by definition -- frankly do not have much time to wait for the vindication of their rights in most cases.

Second is the problem that the Medicare statute does not accord the party challenging the national coverage determination an opportunity to participate in HCFA's deliberations when the validity of the national coverage determination is remanded to HCFA for amplification of the record. The Supreme Court, on one occasion,[530] ruled that it is inappropriate to apply the doctrine of primary jurisdiction where the claimant will not have an opportunity to participate as a party in the administrative proceeding considering the remanded issue.[531]

In sum, the medical character of national coverage determinations may seem to justify the remand procedure established in the Omnibus Budget Reconciliation Act of 1986. However, the fact that invoking the remand procedure will further delay a full consideration of the merits of challenges to national coverage determinations raises questions as to whether beneficiaries have been denied procedural due process, given the lack of meaningful opportunities during the promulgation and administrative review processes to challenge national coverage determinations or their application in individual cases. If such opportunities were made available, then the mandatory remand upon judicial review would be far more defensible.

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[526] See K. Davis, supra note 247, at § 22:1.

[527] 409 U.S. 289, 309 (1973).

[528] Id.

[529] Waldo & Lazenby, Demographic Characteristics and Health Care Use and Expenditures by the Aged in the United States: 1977-1984, Health Care Fin. Rev., Fall 1984, at 3 & 4 (Table 6); see also Dep't of Health & Human Services, Health Status of Aged Beneficiaries (1983).

[530] Nader v. Allegheny Airlines, 426 U.S. 290 (1976).

[531] But see Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) (this problem was one basis for the dissents to this decision); see also B. Schwartz, supra note 252, at § 8.29.

2. Preclusion of APA Chapter 5 Challenges to National Coverage Policy

The Omnibus Budget Reconciliation Act of 1986 specifically withdraws from the federal courts the power to declare unlawful or set aside a national coverage determination because it fails to comply with either the requirements of Chapter 5 of the APA regarding publication in the Federal Register or opportunity for public comment.[532] This is an extraordinary limitation which precludes the federal courts from considering whether one agency has complied with basic requirements of the APA in the promulgation and publication of its policies and rules in a specified area. The effect of this provision is to insulate the Medicare coverage policymaking process for national coverage determinations from attack for failing to comply with fundamental statutory policies regarding the promulgation and publication of rules and policies that Congress established in the APA. This effect has serious implications because, given the HCFA's definition of national coverage determinations in the April 29th Notice,[533] all other national coverage policies would also be insulated from review.

As explained above, Congress justified this prohibition on grounds that current procedures for making national coverage determinations and the need to preserve the scientific integrity of national coverage determinations made compliance with certain APA publication requirements unnecessary.[534] This rationale does not mention national coverage policy pertaining to durable medical equipment and other types of national coverage policy that are not referred to OHTA or even the HCFA Physicians Panel. It appears that Congress has a misconception about the subject matter of Medicare national coverage determinations and the different ways in which national coverage policy is made.

Despite a relatively reserved attitude toward preclusion of judicial review,[535] the Supreme Court has recognized that Congress by statute may preclude judicial review of specified agency action in several contexts.[536] Furthermore, Article III of the federal constitution accords Congress considerable latitude in defining the jurisdiction of the federal courts, especially in cases involving non-constitutional questions.[537] The Supreme Court has recognized that such statutory withdrawals of jurisdiction to review certain matters are permissible.[538] Furthermore, at least one scholar who reviewed the issue for the Administrative Conference of the United States in 1983, concluded that Congress could restrict judicial review of agency rules.[539] Nevertheless, it should be noted that such restrictions on jurisdiction and judicial review such as these are not highly regarded by the courts.[540]

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[532] See supra notes 125, 128-132 and accompanying text.

[533] See supra notes 27-29 and accompanying text.

[534] H.R. Rep. No. 1012, 99th Cong., 2d Sess. 350-351 (1986). See supra note 132 and accompanying text.

[535] See, e.g., Stark v. Wickard, 321 U.S. 288 (1944); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Bowen v. Michigan Academy of Family Physicians, 476 U.S.667 (1986).

[536] See K. Davis, supra note 347, at §§ 28.11-.13; B. Schwartz, supra note 252, at § 8.5. See also infra notes 438-439 and accompanying text. Certainly this has been the case with the Medicare program. See, e.g., U.S. v. Erika, Inc., 456 U.S. 201 (1982); cf. Schweiker v. McClure, 456 U.S. 188 (1982). See supra note 119 and accompanying text.

The statutory preclusion regarding APA challenges to national coverage determinations, however, is quite unique and one wonders at the motive for its conception. It appears that Congress was cognizant of the spate of judicial challenges to Medicare coverage policy on the basis of the APA, since Bowen v. Michigan Academy of Family Physicians[541] removed the jurisdictional bar to challenges to Medicare program policies in 1986[542] as well as the strategy of beneficiary advocates to use the APA to challenge Medicare coverage determinations.[543] Congress clearly sought to limit the litigation over national coverage policies. This was a laudable objective, given increased concern that litigation unduly dictates the shape of federal regulatory policy.[544] However, the legislative history suggests that Congress was primarily concerned about requiring notice-and-comment rulemaking for policies concerning new technologies[545] and not publication of types of national coverage policies including those relating to coverage of durable medical equipment and other types of national coverage policy that are not subject to medical review through OHTA or even the HCFA Physicians Panel.[546] The result of this preclusion is to insulate challenges of entitled beneficiaries, providers and other affected parties to agency action that might be in violation of the APA.

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[537] See Ex parte McCardle, 7 Wall. 506 (U.S. 1868); Weinberger v. Salfi, 422 U.S. 749 (1974); see, e.g., Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974); Redish & Woods, Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (1975); Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981); Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Court, 16 Harv. C.R. & C.L.L. Rev. 129 (1981); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895 (1984); Tushnet & Jaff, Why the Debate Over Congress' Power to Restrict the Power of the Federal Courts is Unending, 72 Geo. L.J. 1311 (1984); cf. Comment, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev. 980 (1975).

[538] For example, the Supreme Court's has sustained the statute providing that no court will have jurisdiction to review a decision of the Administrator of the Veterans Administration on any question of law or fact arising under any law administered by the Veterans Administration. See Johnson v. Robeson, 415 U.S. 361 (1974), upholding 38 U.S.C. § 211(a) (1982 & Supp. 1985); accord., Gott v. Walters, 756 F.2d 902 (D.C. Cir. 1985); see also K. Davis, supra note 347, at § 28.14; cf. B. Schwartz, supra note 352, at § 8.7.

[539] Verkuil, Congressional Limitations on Judicial Review of Rules, 57 Tul. L. Rev. 733 (1983).

[540] See, e.g., DiSilvestro v. U.S., 405 F.2d 150 (2d Cir. 1968); Magno v. U.S., 636 F.2d 714 (D.C. Cir. 1960); cf., Unger v. Smith, 667 F.2d 188 (D.C. Cir. 1981); see K. Davis, supra note 347, at §§ 28.13-.14.

[541] 476 U.S. 667 (1986).

[542] See supra note 294 and accompanying text.

Although this prohibition is probably legal because of the acknowledged power of Congress to preclude judicial review of agency action by statute and to restrict jurisdiction of the federal courts under Article III of the constitution,[547] it is highly undesirable from a policy perspective. Two policy issues are at stake. First, it is ill-advised to cut off all opportunities for challenging the promulgation and publication of national coverage determinations under the APA particularly in view of the controversy over the present procedures for promulgation and publication of national coverage policy. Second, and more importantly, this particular preclusion strikes at the heart of the policies that Congress sought to establish for the promulgation and publication of agency policies, rules and regulations in the APA. In sum, it is incongruous, as well as undesirable, that Congress should insulate a major policymaking process of the second largest federal entitlement program from the requirements of the APA, particularly at a time when there is so much controversy about the Medicare coverage policymaking process and whether beneficiaries are getting their benefits under the program.

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[543] See Wilson, Administrative Procedure Act, supra note 322.

[544] See Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 655 U. Wis. L. Rev. 655 (1985). This article suggests that limitations on existing rights of private parties to challenge regulatory policy judicially should be limited in order to address this problem.

[545] See supra note 132 and accompanying text.

[546] See supra notes 42-48 and accompanying text.

[547] See supra notes 537 & 539 and accompanying text.

VI. RECOMMENDATIONS

Below are offered proposed recommendations for changes in the national coverage policymaking process and the administrative and judicial review of individual national coverage determinations. The recommendations, addressed primarily to HHS and, in some instances, Congress, are offered with the recognition that HHS and HCFA face serious problems in controlling Medicare program costs and ensuring the efficient administration of the Medicare program, both within HCFA as well as through the Medicare contractors. However, the recommendations are also conceived as appropriate to protect the recognized entitlement interest of Medicare beneficiaries in Medicare program benefits and to accord beneficiaries the means by which they can protect these important entitlement interests.

A. Promulgation and Publication

The recommendations for reforms of the Medicare policymaking process are addressed strictly to administrative law issues. Some criticisms of the Medicare coverage policymaking process, e.g., the methodologies used in the technology assessment process of OHTA, are not addressed in these recommendations. The overall concept encompassed in these recommendations regarding promulgation and publication is that HCFA's policymaking process should encourage participation of beneficiaries, providers and other interested groups in the promulgation of Medicare coverage policy and that publication assures that beneficiaries as well as the providers that decide what services will actually be provided beneficiaries are aware of Medicare coverage policies and their rationale.

1. Procedures and Criteria for Making National Coverage Policy Promulgation.

HCFA should promulgate the procedures and all criteria used in making all types of national coverage policy as a legislative rule under the notice-and-comment rulemaking procedures of § 553 of the APA. In this rulemaking proceeding, HCFA should specifically solicit the input of beneficiaries, providers, health equipment manufacturers and other affected parties. As indicated above, HCFA already plans to proceed with this recommendation.

Elements of Procedures for Making National Coverage Policy. HCFA should specify the procedures for making national coverage policy in the legislative rule. The process should include the following features: (1) specification of the process by which HCFA selects coverage questions that will be considered in this process; (2) identification and description of what type of coverage issues will be left to Medicare contractors and the HCFA regional offices to decide; (3) identification of who in HCFA makes national coverage policy, particularly if the underlying coverage question is not referred to the HCFA Physicians Panel or OHTA; (4) opportunities for public input for all national coverage policies, including policies affecting durable medical equipment and other types of national coverage policies that are not referred to the HCFA Physicians Panel or OHTA; (5) a fixed deadline from the point at which a coverage issue is referred to HCFA by which HCFA must make a decision on a coverage issue; and (6) a description and index of all locations in which coverage policy will be published including HCFA manuals, letters to Medicare contractors, bulletins or other statements of HCFA regional offices and the *Medicare Coverage Issues Manual*.

Specification of Criteria. In the legislative rule that HCFA promulgates regarding the national coverage policymaking process, HCFA should specify criteria it uses in making national coverage policy, including for example, the criteria for coverage of durable medical equipment now stated in the *Medicare Carriers Manual*. Also, if HCFA intends to adopt cost effectiveness as a criterion for making national coverage policy, (an approach many observers encourage), this criterion should be included in the legislative rule. Finally, HCFA should also establish in the legislative rule all the criteria that its regional offices and Medicare contractors use in making other types of coverage policy and individual coverage decisions.

Publication. If HCFA promulgates the procedures and criteria for making national coverage policy as a legislative rule under § 553 of the APA, then publication of these procedures and criteria will be accomplished through publication of a proposed and final rule in the Federal Register. Nevertheless, HCFA would be required, by the Freedom of Information Act, to publish its final procedures in the Federal Register. HCFA should also endeavor to be sure that the organizations representing beneficiaries, providers, health equipment manufacturers and other interested parties are informed about the rule which establishes the procedures and criteria for national coverage policy.

2. Individual National Coverage Policies

Promulgation. Assuming that HCFA promulgates the procedures and criteria for making national coverage policy as a legislative rule, then individual coverage policies could appropriately be promulgated as interpretative rules. Nevertheless, it is important that HCFA devise a policymaking procedure that accords beneficiaries, providers and other interested parties an opportunity to have input into the formulation of specific national coverage policies. Input from groups with medical expertise is especially important because of the medical nature of the decisions involved in making most national coverage policy.

HCFA should consider developing a policymaking process that offers an opportunity for a structured discussion with beneficiary, provider and possibly industry representatives and HCFA about proposed policies in a manner similar to negotiated rulemaking approaches used by other agencies. Such a structured discussion would provide an excellent opportunity to obtain the requisite medical and technical input needed for sound policies. More importantly, such a discussion might also educate beneficiary groups about the rationale for HCFA's position on coverage issues and the resulting coverage policies. Such discussion would also enable HCFA to obtain a better understanding of beneficiary concerns, thereby mitigating subsequent judicial challenges of these coverage policies.

Publication. HCFA should follow Recommendation 76-5 of the Administrative Conference of the United States on publication of interpretive rules of general applicability, and publicize all national coverage policies the Federal Register upon promulgation. Following this procedure would also provide an informal reconsideration process of national coverage policy about which there is controversy, without subjecting HCFA to undue political pressure or administrative inconvenience of a mandatory reconsideration process. Regarding other types of Medicare coverage policy of Medicare contractors and HCFA regional offices, Recommendation 86-5 of the Administrative Conference of the United States on Medicare Appeals expressly recommends that HCFA and Medicare contractors publish and make available all coverage policy, including "insurance industry rules or other screening devices" used in making coverage decisions regarding the amount, duration and scope of benefits accorded beneficiaries in specific cases.

HCFA and Medicare contractors must do more to be sure that the aged and infirm beneficiaries of the Medicare program, and the providers who serve them, are genuinely informed of coverage policy. HCFA and Medicare contractors should work closely with national organizations representing beneficiaries, including legal services advocates for the elderly, to apprise these organizations of Medicare coverage policy and its rationale. HCFA and Medicare contractors should provide these groups with sufficient information to enable these groups to inform their constituencies about Medicare coverage policy.

HCFA should provide an accessible and comprehensible means by which Medicare beneficiaries and their providers can ask questions about coverage of specific items or services. Most importantly, HCFA should also identify and index all policies in manuals and other documents defining coverage of Medicare benefits in a form that is accessible and comprehensible to beneficiaries.

B. Administrative and Judicial Review

1. Administrative Review

The restrictions imposed on the authority of administrative law judges to adjudicate national coverage determinations in the Omnibus Budget Reconciliation Act of 1986 are inappropriate and vitiate administrative review of national coverage determinations. Congress should repeal these restrictions on the authority of ALJs to adjudicate national coverage determinations.

2. Judicial Review

Mandatory Remand to HCFA of Challenged Coverage Determinations. The concept of mandatory remand of challenged coverage determinations is an appropriate approach to maintaining the scientific integrity of medically-based coverage policy. This also is clearly consistent with the administrative law doctrine of primary jurisdiction. However, in the context of the current coverage policymaking process, which accords little opportunity for public participation of beneficiaries, providers and other interested groups in the formulation of coverage policy, and the limitations on the authority of ALJs to adjudicate the validity of national coverage determinations, mandatory remand upon judicial review is undesirable. The reason is that it postpones the opportunity for beneficiaries to get a decision on the validity of the coverage policy applied to curtail the benefits to which they may well be entitled. Beneficiaries who are forced to wait so long for a decision on the merits on a coverage policy applied with respect to their medical treatment would likely become discouraged about a process weighted so heavily in favor of HCFA. This process poses too many obstacles to beneficiaries' efforts to get a final decision on the merits. Congress should repeal this mandatory remand requirement.

Preclusion of APA Chapter 5 Challenges. The provision in the Omnibus Reconciliation Act of 1986, proscribing courts from invalidating national coverage determinations for failure to comply with certain requirements of the APA, is ill-conceived. First, it appears to be based on Congress' misconception that national coverage policies pertain only to medical technologies that OHTA has assessed. Second, and more importantly, it exempts an important policymaking process in a major federal entitlement program from thorough judicial scrutiny and withdraws the protections of the APA from a vulnerable class of beneficiaries chiefly to insulate HCFA from litigation. There are other ways, e.g., a public and expeditious promulgation and publication process and meaningful administrative review, to decrease judicial challenges to national coverage determinations. Congress should repeal this provision and assure the beneficiaries of the Medicare program full protection of the APA.

C. Conclusion

Medicare coverage policy is extraordinarily important to the aged and disabled beneficiaries of the Medicare program because it defines the type, amount, duration and scope of the health services that, as a practical matter, will be available to them for the treatment of their illness or injury. While it is important for HCFA to administer the Medicare program as efficiently and inexpensively as possible and to control Medicare expenditures as aggressively as possible, HCFA should not lose sight of the importance of coverage policy and its implementation to Medicare beneficiaries. HCFA must craft a promulgation and publication process for all Medicare coverage policy including national coverage policy as well as procedures for administrative and judicial review that genuinely protect and, indeed, promote the entitlement interest of Medicare beneficiaries in the Medicare program over the achievement of other goals.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-9

OFFSET DISPUTE PROCEDURES UNDER THE DEBT COLLECTION ACT OF 1982

by

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August 1987

Introduction

The Debt Collection Act of 1982 (DCA)[1] was passed in response to concern over the vast amount of delinquent debt owed to the federal government and the poor record of many government agencies in collecting debts owed to them.[1a] The focus of Congress appears to have been the various mass loan and loan guarantee programs, most conspicuously the student loan programs, although the effects of the Act extend well beyond such programs.[1b] The Act included about a dozen provisions designed to facilitate the use of various collection techniques, in many instances by removing obstacles created by other federal statutes and caselaw. Among the provisions of the Act were ones designed to facilitate use of collection agencies,[1c] charging of interest and penalty fees,[1d] reporting of delinquent debtors to credit bureaus,[1e] and use of IRS information to locate debtors.[1f] According to some government collection officials, the primary significance of the statute was simply to signal Congressional interest in debt collection, and thereby to encourage agencies to give it more priority. According to these officials, the specifics of the Act are useful, but of less importance than the establishment of efficient, computerized collection systems with adequate resources and management.[1g]

While the thrust of the DCA was to enhance collection effort, Congress was also concerned about protecting the due process rights of debtors against whom the government was to take action. For example, in adopting provisions providing for collection by offset against salaries and other money owed by the federal government to government debtors, Congress provided for pre-offset opportunities for debtors to dispute the relevant debts.[1h] This report examines the implementation of the statutory offset disputes provisions, and some issues raised by this attempt to integrate due process protections with effective government debt collection.

I. Background on Offset Under the Debt Collection Act

The DCA provides for two forms of debt collection by offset -- salary offset and administrative offset.

Salary Offset

Salary offset refers to deductions from the pay of U.S. government employees to pay debts owed to the government. The amount deducted may not exceed 15% of disposable pay without the debtor's permission.[2] Use of salary offset to collect general debts owed to the government is new to the 1982 DCA -- previously only a limited class of debts could be collected by salary offset.[3] Salary offset is of greatest significance in connection with government programs which extend or guarantee credit to large numbers of ordinary individuals (as opposed to businesses), and thus to large numbers of government employees. The relative importance of salary offset as a collection device is increased in connection with programs involving no security or security of limited value.

It is likely that the agency which has made greatest use of salary offset is the Department of Education which, as a result of various student loan and loan guarantee programs, is owed unsecured debt by a vast number of individuals. Another agency which guarantees many loans to individuals is the Department of Housing and Urban Development (HUD). However, much HUD debt is secured by first mortgages on real estate, and the agency apparently feels that use of salary offset is unnecessary in connection with such debt, because HUD can rely on the security.[4] The HUD Title I program, however, has been a major user of salary offset.[5] This program guarantees loans for rehabilitation and for mobile homes, and the relevant credit is typically secured either by second mortgages or security interests in mobile homes. These forms of security are often inadequate to cover the relevant debts.[6]

Several other government agencies extend or guarantee debt to numerous individuals, but had not yet made major use of salary offset as of late 1986. Examples include the Small Business Administration (in connection with disaster loans),[7] the Veterans Administration,[8] and the Farm Home Administration.[9] These agencies expected to make use of salary offset in the future.

Use of salary offset by agencies engaged in mass credit programs usually starts with a periodic computerized match of a list of debtors with a list of government employees. It apparently takes considerable additional checking concerning employment status, the validity of the debt, etc., to go from the list of computerized matches to a list of government employees against whom offset can actually be used.[10] A Department of Education match in 1981 identified 47,000 government employees with overdue student loans totalling $68 million. Amounts owed thus averaged between one and two thousand dollars. Notices of intent to offset were sent to 17,000 debtors. Of these, 15,000 made voluntary repayments totalling $10.6 million, while another $3.4 million was collected by means of actual offsets.[11] A 1984 match by the HUD Title I program identified about 5000 potential "hits," with about 1400 proving to be usable targets for salary offset notices.[12]

Salary offset is also sometimes used outside of large scale sweeps by agencies with mass consumer lending programs. For example, in one instance, the SBA attempted to offset the salary of a Commerce Department employee who cosigned a note for an SBA loan to a family business.[13] Another frequent use of salary offset is to collect overpayments by the government to its employees, e.g., as a result of mistakes in calculating pay, failure to use travel advances, etc. This use of salary offset was common long before the DCA, and the application of the DCA to ordinary pay adjustments is somewhat controversial. Some government agencies, along with the GAO, feel that the due process requirements of the DCA and the OPM salary offset regulations are overly burdensome when applied to routine pay adjustment. The armed services, which were particularly concerned, had a statute passed designed to relieve them of these procedural requirements. The GAO continues to feel that the procedures are overly burdensome for the civilian agencies as well.[14] Unfortunately, within the scope of this study it was not possible to get an empirical handle on the seriousness of this problem.

Administrative Offset

Administrative offset is defined as "withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government."[15] Unlike salary offset, administrative offset has long been used by the federal government to collect debts of all sorts. The government has asserted a common law right to use offset, just like private creditors, and this right has been upheld by the Supreme Court.[16] In addition, numerous statutes relating to specific federal programs explicitly provide for offset as means to collect debts associated with the programs. The effect of the DCA provision on administrative offset was to add language to the 1966 Federal Claims Collection Act, giving a general statutory authorization for the use of offset, while imposing procedural protections on its use.[17]

Unlike salary offset, which is commonly used either for pay adjustment or in periodic, more or less systematic, sweeps by government agencies engaged in mass consumer lending programs, the use of administrative offset is extremely varied and often rather unsystematic. This is true because of the wide variety of circumstances in which a person or organization may both owe money to and be owed money by the government. A very common use of offset is in connection with government contract disputes.[18] Another common use is in connection with grant programs, particularly where a single recipient receives several different grants.[19] If money is owed in connection with one grant (e.g., because of misallocation of funds), it will often be withheld from a subsequent grant. This use of offset most commonly occurs where a single recipient receives periodic or multiple grants from the same program. In this situation, relevant officials will be aware of both the debt and the existence of a later grant from which money can be offset.

Where a person or organization owes money to the government in connection with one program and is owed money in connection with another program, offset is also possible. It is less likely to occur, however, because relevant officials are less likely to be aware of offset possibilities. This is particularly true if the two programs are administered by different agencies. The subjective impression obtained from interviews with government collection officials is that, with some exceptions, inter-program and inter-agency offset occurs on a sporadic basis, when someone notices an opportunity, but does not occur systematically.[20] However, use of inter-program offset may be more common in connection with debts arising out of government contracts. The Army maintains a so-called "Holdup List" of (not only Army) contractors who owe money to the government. Contract disbursement officers are supposed to withhold funds owed to businesses on the list.[21]

By its nature, salary offset is used against individuals. Dollar amounts involved are generally under $20,000 and often under $5000. By contrast, targets of administrative offset are often organizations. The amount of money involved can range up to millions of dollars, and will often be larger than the consumer type loans typically the subject of salary offset. One class of administrative offset transactions, however, involves debts owed by individual government employees and are likely to be more similar to salary offset cases. This class is administrative offset against federal retirement funds owed to retiring or retired federal employees.[22]

II. Some Procedural Concepts

Due process cases and scholarship have identified a number of possible dimensions along which adjudicatory procedures can vary.[23] In practice, the jurisprudence of informal administrative adjudication has tended to focus on whether an oral hearing is required or whether decisions can be made on a purely written record.[24] In the context of offset disputes, a focus on a somewhat different distinction seems useful, both for descriptive and evaluative purposes.

This is a distinction between two general approaches to administrative review of agency actions. For present purposes, we will call these approaches bureaucratic review and adjudicatory style review.[25] Although these concepts are not explicitly used in the DCA and associated procedural regulations, it appears that agencies generally use a form of bureaucratic review in connection with administrative offset cases and a simplified form of adjudicatory style review in salary offset cases.

The term bureaucratic review is used to refer to a process in which an agency unit, in effect, reconsiders its own original determination. The relevant decision maker might not be the individual who made the original determination but he or she will be someone involved with and knowledgable concerning the relevant agency program. In making a decision, the decision maker will have informal access to all relevant information available to the agency (along with information and arguments supplied by the debtor). Because the decision maker is part of the relevant bureaucracy, he or she will know how to obtain access to and use the relevant information without the need for an advocate to assemble and present material in the form of an explicit "case" and record. (However, it should be noted that in a well organized debt collection operation, whether in the public or private sector, all information concerning a particular debtor is kept in a single defined file. Moreover, under the DCA, a debtor subject to offset is entitled to see all information concerning the debt that is in the hands of the relevant agency.[26] Thus, in offset cases, the distinction between all information in the hands of an agency and a defined adjudicatory record may be fuzzy in practice.)

The term adjudicatory style review is not meant to refer to a formal adjudication, but rather to any decision process that fits conventional notions of adjudication in at least certain minimal respects. In particular, the decision maker is (at least de facto) independent of the agency unit that made the original determination. In addition, to obtain information, the decision maker relies on interested parties (in the offset context, the debtor and someone representing the agency in its role as debt collector) to each present a "case" on their behalf.

In terms of concepts sometimes used in the administrative due process literature, adjudicatory style, as opposed to bureaucratic, review is characterized by independence of the decision maker; adversarial, as opposed to investigatory, fact finding, and reliance on a defined, though perhaps informal, hearing record.[27]

Some of the practical differences between bureaucratic review and adjudicatory style review, even in the absence of formal oral hearings, can be seen in a Small Business Administration case dealing with an attempt by the SBA to use administrative offset against money due to be paid to a pair of delinquent SBA business debtors by the Agricultural Stabilization and Conservation Service.[28] The SBA, unlike most agencies, employs adjudicatory style review in administrative offset disputes, with cases decided by administrative judges at the SBA's Office of Hearings and Appeals.[29] In the case at issue, the debtors acknowledged the existence of the debt but argued that the SBA should be estopped from applying an administrative offset because it had not responded to a proposal by the debtor to restructure debts owed to the SBA and another creditor. The SBA District Counsel office handling the debt failed to answer the debtors' contentions or to supply underlying loan documents. The judge therefore felt compelled to rule in favor of the debtors.

On the merits, the debtors' argument in this case seems colorable, but by no means a clear winner. From the perspective of typical notions of adjudication, however, this is an "easy case," remarkable only for the SBA District Counsel's apparent lack of diligence. In an ordinary adjudication, if a creditor fails to make its case, the debtor wins. The case might have looked different, however, within a bureaucratic review system. Instead of requiring a submission by the SBA counsel, the decision maker might have gained direct access to the agency's records concerning the debt, identified relevant documents, and on his or her initiative used the information to evaluate the debtors' contentions. In other cases, bureaucratic review might substantiate contentions inartfully made by debtors.

The distinction between bureaucratic review and adjudicatory style review is a rough one, and it is possible to imagine hybrids. For example, one could have an adversarial factfinding with a non-independent decision maker. (As will be discussed below, some agency offset hearing regulations appear to call for this in some circumstances.) However, to the extent the decision maker conscientiously bases the decision on the parties' presentations, this approach would seem closer to adjudicatory style review, although the decision maker's expertise/preconceptions would presumably play some role. Conversely, in principle, an independent decision maker might use investigatory fact finding. This is done in some administrative contexts, particularly in connection with benefits programs.[30] (In a sense, the ideal model of an independent decision maker using investigatory fact finding might be a special prosecutor.) However, for a variety of reasons, use of independent decision makers tends to be associated with adversary fact finding. Partly this is a matter of tradition, reinforced by the weight of traditional trial models and, to some extent, a sense that fairness implies adversary procedures. There are also more practical considerations. There are likely to be costs, or at least perceived costs, in terms of time, personnel, and disruption of routines and chains of command to giving independent outsiders direct access to information in the hands of agency debt collection units. Moreover, lack of expertise (including familiarity with informal bureaucratic routines) may limit the ability of independent decision makers to effectively take advantage of such access.

Finally, it should be noted that issues relating to the bureaucratic review/adjudicatory style review distinction obviously do not exhaust the range of procedural issues raised by the DCA. For example, within the context of adjudicative style review there are such traditional issues as the appropriate degree of formality of procedures, the need, if any, for oral hearings, etc.

III. DCA Dispute Procedures

A. Requirements of DCA

1. Salary Offset

The DCA requires the following procedures before debts can be collected by salary offset:

1. At least 30 days written notice covering
    a. the nature and amount of indebtedness
    b. the intention of the relevant agency to use salary offset
    c. an explanation of the debtor's procedural rights.[31]
2. An opportunity to inspect and copy government records relating to the debt.[32]
3. An opportunity to enter into agreement, under terms agreeable to the relevant agency, to establish a schedule for repayment of the debt.[33]
4. An opportunity for a "hearing" on the determination of the agency concerning the existence or amount of the debt and the repayment schedule.[34]

A salary offset hearing must be conducted by an administrative law judge or other person not under the control of the head of the creditor agency. Filing of a petition for a hearing stays the offset. Presumably, in order to avoid delay in collections, tight deadlines are provided. Petitions for hearings are to be filed within 15 days of receipt of notice of offset and the hearing official must issue a final decision not later than sixty days after the filing of the petition. The DCA is otherwise silent concerning hearing procedures for salary offset.[35]

2. Administrative Offset

The DCA provision on administrative offset specifies four procedural protections parallel to those in the case of salary offset, including rights to notice, an opportunity to inspect and copy agency records, an opportunity to make a written agreement to repay the debt, and an opportunity for review of the agency's original decision concerning the debt. (A fifth procedural protection may be implicit in statutory language stating that agencies may collect by administrative offset "After trying to collect a claim under [31 U.S.C.1 section 371] . . . ." Presumably this requires some dunning or other collection efforts before administrative offset may be used.)[36]

With respect to dispute procedures, the DCA language with respect to administrative offset differs from that with respect to salary offset in four potentially significant respects. First, the salary offset provision gives the debtor the right to a "hearing," while the administrative offset provision gives the debtor a right to "a review within the agency." Second, the administrative offset regulations contain no requirements concerning the person or persons who conduct the review, while the salary offset provision requires that the "hearing" be conducted by an ALJ or other person not under the control of the agency head. Third, the administrative offset provision does not explicitly specify that filing a petition for review stays the offset or other collection proceedings. (However, the provision does state that the opportunity for review, along with other procedural protections, must be provided "prior to collecting any claim through administrative offset.") Fourth, no time limits on review are specified.[37]

The meaning of the last three differences seems fairly clear. Does the distinction in language between "hearing" and "review within the agency" have any implications? Unfortunately, the legislative history apparently does not discuss this word choice. The literal meaning of the words is also of limited help, since, in contemporary legal usage, a hearing can refer to virtually any opportunity by a person affected by government action to present arguments and evidence to a decision maker.[38]

One interpretation of the DCA's language is that in the context of salary offsets Congress intended something like what we have called adjudicatory style review, while in the context of administrative offset it considered something like bureaucratic review acceptable. This interpretation is based on the distinction drawn in the statute with respect to the need for an independent decision maker combined with the adversarial connotations of the word "hearing" as contrasted with the more administrative sounding phrase "review within the agency." Moreover, the failure to specify time limitations in connection with administrative offset review is consistent with a review process under the control of the creditor agency -- which can expedite procedures to avoid delay in collection if it chooses to do so. It is also plausible that Congress intended more formal procedures in the context of salary offset. In the due process jurisprudence there is a tradition of special concern for takings that affect wages.[39] Moreover, federal employees' salaries have historically not been subject to garnishment for ordinary debts, so use of salary offset for general government debts was seen by some as a major encroachment, to be hedged with relatively stringent procedures.[40] By contrast, the federal government had long used administrative offset, often with no prior procedural protection at all.[41]

3. Government-wide Regulations

The government-wide regulation concerning salary offset is Part 550 of the Office of Personnel Management Pay Administration Standards,[42] while that dealing with administrative offset is section 102.3 of the Federal Claim Collection Standards (FCCS),[43] issued by the General Accounting Office and the Department of Justice. Both the OPM standards and the FCCS direct agencies to issue their own regulations implementing the DCA.[44] Neither attempts to give a comprehensive outline of dispute procedures that must be followed, giving individual agencies flexibility to adopt procedures they choose. However, both the OPM standards and the FCCS prescribe minimum procedural requirements on certain specific issues.

The OPM standards state generally that, "The form and content of hearings granted under this subpart will depend on the nature of the transactions giving rise to the debts included within each debt collection program."[45] They also call for written decisions.[46] Otherwise, agencies are directed to refer to the discussion of procedures in section 102.3(c) of the FCCS.[47] Thus, the same government-wide regulation applies to hearing procedures for "hearings" in connection with salary offset and "review within the agency" in connection with administrative offset.

Like much of the due process jurisprudence, section 102.3(c) focuses almost entirely on identifying circumstances in which the debtor is entitled to an oral hearing. Based largely on the Supreme Court's decision in Califano v. Yamasaki,[48] which is discussed below,[49] the FCCS provide for an oral hearing where a decision to waive a debt "turns on an issue of credibility or veracity," or where an issue concerning the debt itself "cannot be resolved by review of the documentary evidence;" for example, when the validity of the debt "turns on an issue of credibility or veracity."[50] The regulation specifies that, "Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the agency should always carefully document all significant matters discussed at the hearing."[51] This last sentence, in its reference to "matters discussed at the hearing" (emphasis added), seems to contemplate an adjudicatory style hearing at which adversary parties present their views, although it does not explicitly preclude an oral meeting with a debtor as part of a more investigatory mode of fact finding.

The FCCS also provide that, "In those cases where an oral hearing is not required . . ., the agency shall nevertheless accord the debtor a 'paper hearing,' that is, the agency will make its determination . . . based upon a review of the written record."[52] The provision does not specify whether "written record" refers to written submissions made to a designated decision maker, consistent with adjudicatory style review, or whether the phrase refers to all written information in the hands of the agency, consistent with the bureaucratic review model.

4. Agency Regulations

The OPM standards and the FCCS appear to contemplate that agency regulations will flesh out their provisions on dispute procedures, since the government-wide provisions offer specifics only on a few narrow points. In practice, many agency regulations have not laid out detailed procedures for disputes in offset cases. This is particularly true with respect to administrative offset. In some cases, agency regulations do little more than track the FCCS or OPM standards.[53] In some others, agency regulations usefully add to the government-wide requirements but still do not lay out a full procedural system.

There are a number of possible reasons for the failure of agencies to set out more detailed procedures. To the extent that some form of bureaucratic review was contemplated, adjudicatory procedural questions may have seemed irrelevant. Even with respect to adjudicatory style review, the FCCS clearly encourages informal procedure, and agencies may have felt that simple and undetailed regulations promoted this objective. Some agencies may have felt that more detailed procedures could be specified in documents not formally enacted as part of the CFR. Finally, offset dispute procedures may have lacked salience in some agencies. We will now examine the procedural regulations at selected agencies, focusing on a number of the major creditor agencies.

a. Department of Education

Salary Offset

Perhaps the most complete and elaborate offset dispute procedures are those the Department of Education has established for use in salary offset cases. The procedural regulations provide for a two-stage procedure, with the first stage apparently taking a bureaucratic review form. The second stage is an adjudicatory style proceeding, but is structured more as a review of the agency's decision at the first stage than as a de novo determination.

The Education regulations provide for two separate notices to the debtor prior to use of salary offset. The initial notice tells the debtor of the amount alleged to be owed, and of the intent of the Secretary of Education to offset 15 percent of the debtor's salary unless the debtor can demonstrate that this would produce extreme financial hardship.[54] The debtor can then request a copy of agency records relating to the debt and a reconsideration concerning the existence or amount of the debt or a reconsideration of the offset schedule based on financial hardship.[55] A debtor requesting reconsideration is to submit a statement with supporting documents. For hardship claims, the regulation specifies the types of financial information the debtor is supposed to supply.[56] If the appropriate information is supplied within 45 days, the Secretary (presumably agency personnel acting as the Secretary's designees) "reconsiders" the offset.[57] If the Secretary denies the debtor's request, the debtor is supplied with a statement of reasons for the decision, together with a second "formal notice."[58]

The formal notice again identifies the amount of the debt and the agency's intention to offset the debtor's salary. It also informs the debtor of a right to a "hearing" and of "applicable hearing procedures and requirements."[59] A debtor desiring a hearing must file a petition, and indicate whether he or she would like a hearing consisting solely of written submissions.[60] If the debtor does not request a paper hearing, an oral hearing is held.[61] Thus, any debtor who wants an oral hearing can have one. This is a broader right to an oral hearing than is required by the FCCS, which permits agencies to deny an oral hearing unless resolution of certain types of factual issues requires one. A debtor who petitions for a hearing is automatically sent a copy of agency records concerning the debt, if the debtor has not previously obtained them.[62] Prior to the hearing, the debtor must file a statement of reasons why the Secretary of Education's prior determination concerning the debt was "clearly erroneous" or why the offset would produce "extreme financial hardship." The statement must include a statement of facts and legal arguments on which the debtor relies, copies of documentary evidence not already in the hands of the agency, and a list of witnesses with a summary of their anticipated testimony. The Secretary of Education must submit similar information to the debtor. No other pre-hearing discovery is permitted.[63] Hearings for civilian federal employees are ordinarily held in Washington, D.C. or in one of ten major cities around the country where the Department has regional offices.[64]

As required by the DCA, the hearing is conducted by an official not under the supervision of the Secretary of Education.[65] The Department of Education apparently has no ALJ's and is making arrangements to borrow Veterans Administration employees to serve as hearing officials.[66] No record or transcript of the hearing is made and formal rules of evidence are not applied. Witnesses, however, are under oath and may be cross-examined. The debtor may be represented by a person of the debtor's choice.[67]

In addition to more purely procedural matters, the regulations attempt to specify the scope of review and burden of proof for the hearing official. If the debtor challenges the Secretary's offset schedule, "the hearing official shall uphold the Secretary's offset schedule unless the employee has demonstrated by clear and convincing evidence that the payments called for. . . will produce an extreme financial hardship. . . ."[68]

If the debtor challenges the Secretary's determination concerning the debt, "the hearing official shall issue a decision in favor of the Secretary's determination, unless the hearing official finds that the employee has demonstrated that the Secretary's determination was clearly erroneous based on information that was available to the Secretary before he issued the [formal notice which follows the Secretary's reconsideration and informs the debtor of his or her right to a hearing]."[69]

Thus, in cases involving either hardship claims or challenges to the debt, the debtor has the burden of proof, and must establish his or her position by more than just a preponderance of the evidence. Moreover, in a challenge to the debt, the debtor must show that the Secretary's determination was wrong based on the information that was available to the Secretary before the hearing itself.

The latter requirement is presumably designed to protect the integrity of the earlier bureaucratic review stage of the Department's dispute procedures. It encourages debtors to make their full case at the earlier stage and, if followed, limits the danger of the adjudicatory style hearing process becoming a duplicative substitute for the Secretary's "reconsideration."[70] Nevertheless, there would appear to be conceptual contradictions between providing an oral evidentiary hearing and limiting the scope of the hearing official's decision to an evaluation of an earlier agency determination made without the oral evidence. Much, if not all, of the reason for holding an oral evidentiary hearing is the assumption that oral evidence has qualities that make it particularly valuable for certain truth-finding purposes.[71] Certainly, this reason for oral hearings is implicit in the FCCS treatment of the subject.[72] However, it is difficult to see how the (real or supposed) special qualities of oral evidence can be taken advantage of in evaluating whether an earlier decision was clearly erroneous based on a body of written information not including the oral evidence itself.

Consider the following hypothetical: In the first stage of Education's procedures, a debtor asks the Secretary to reconsider a debt based on allegations of fraud by a vocational school that originated the loan. The written allegations are somewhat vague and are rejected by the agency. At a subsequent oral hearing, the debtor makes the same contentions, but is considerably more articulate orally than in writing. Moreover, on cross-examination the debtor displays a credible demeanor and responds with convincing circumstantial details. Finally, when the hearing official or the attorney for the agency raises certain technicalities of the law of fraud, the debtor responds by highlighting certain facts which the debtor had not previously known were relevant.

In this hypothetical, the oral hearing would have fulfilled three functions which are often alleged to be advantages of oral hearings.[73] The hearing would have offered an opportunity for a party who is more articulate orally than in writing to present his or her best case. It would have given the decision maker an opportunity to evaluate credibility. It would have given a party an opportunity to flexibly shape arguments to the concerns of the decision maker.

Yet it is not clear how the debtor's presentation to the decision maker could be used to show that the agency's decision was clearly erroneous based on the information available to it before the hearing. Thus, in this hypothetical case, the oral hearing could have no effect on the outcome under the Education regulations.

The use of oral evidence at the second stage hearing seems unnecessary and even irrelevant if the function of the hearing is essentially to review the quality of an earlier bureaucratic reconsideration.[74] Conversely, to the extent that the FCCS (and possibly due process) require consideration of oral evidence to evaluate credibility or other subjective issues, the scope of review provision of the Department of Education regulations may be overly restrictive.

The Department of Education regulations also provide some guidance with respect to the substantive standards the hearing official should apply. In cases concerning the validity of the debt, any previous judgment or other court determination against the debtor is deemed conclusive.[75] The hearing official is generally directed to refer to Federal statutes and regulations concerning the programs giving rise to the debt and to relevant state law.[76] The regulation goes out of its way to specify that lack of quality of education is not a defense to repayment of a student loan unless the lack of quality constitutes a legal defense to repayment and the relevant school directly made the loan to the student.[77] This last requirement is partially inconsistent with the FTC's anti-holder in due course trade regulation rule and the similar anti-holder in due course laws of some states.[78] Under the FTC rule, if a buyer (including a buyer of educational services) has a legal defense against a seller (including a proprietary school), and the purchase was financed by a loan from a lender other than the seller, but the lender has a business relationship with the seller, the legal defense is good against the lender and the lender's assignees.[79]

With respect to claims of "extreme financial hardship," the regulations attempt to translate this potentially subjective determination into a more objective financial test -- whether the proposed offset schedule prevents the debtor from meeting essential subsistance costs. These costs are further defined to include "only costs incurred for food, housing, clothing, transportation, and medical care."[80] This attempted standardization of the hardship test potentially reduces the need for oral hearings under the approach of the FCCS. However, the regulation does provide for the consideration of some relatively subjective issues; for example, "Whether these essential subsistance expenses have been minimized to the greatest extent possible," and "The extent to which the employee and his or her spouse and dependents can borrow money. . . ."[80a]

Administrative Offset

The Education procedural regulations for administrative offset are less elaborate than the agency's regulations for salary offset, and go beyond the FCCS in only limited respects.[80b] They specify that a debtor petitioning for review must supply certain information identifying the debt, "an explanation of the reasons the debtor believes that the [agency notice of offset, which includes a description of the nature and amount of the debt] inaccurately states any facts or conclusions relating to the debt, and copies of documents the debtor wishes the agency to consider.[80c] In cases where there is no oral hearing, the review procedure is described briefly as follows: ". . . the Secretary -- (1) Reviews the documents submitted by the debtor and other relevant evidence; and

(2) Notifies the debtor in writing of the Secretary's decision regarding the issues defined in the (offset) notice. . . and, if appropriate, the question of waiver of the debt."[81]

The regulations thus appear to describe a bureaucratic review process since review is conducted by designees of the Secretary of Education, who can look to "other relevant evidence," apparently without a defined hearing record being established. According to a Department of Education collection official, administrative offset reviews are typically conducted by agency program officials, who use all the information available to them in reaching a decision.[82]

If the debtor wants the review to be conducted as an oral hearing, the debtor must supply an explanation of why issues concerning the debt cannot be resolved through a review of documentary evidence, a list of witnesses, and a statement of the issues about which the witnesses will testify and of the reasons why each witness's testimony is necessary.[83]

The agency is to grant or deny a request for an oral hearing based on standards that essentially track the standards of the FCCS.[84] The hearing is conducted by an official designated by the Secretary of Education. The regulations specify that the oral hearing is not a formal evidentiary hearing governed by 5 U.S.C. 554 unless one is required by law in some particular circumstance; and that the debtor has a right to representation, and to present and cross-examine witnesses.[85] Otherwise, little is stated about procedures. The regulation does not make clear that the agency will present its own "case" at hearings, but the reference to cross-examination by the debtor seems to presume that the agency will be represented and present evidence. The hearing official is instructed to "Review the evidence presented at the hearing, the documents submitted by the debtor, and other relevant evidence."[86] The regulation does not make clear whether the "other relevant evidence" is confined to evidence presented at the hearing or whether the hearing official can pursue other information, in a more bureaucratic form of review.

b. HUD

Salary Offset

HUD's procedures for salary offset disputes are contained partly in HUD's interim salary offset regulations at 24 CFR sections 17.125--17.139 and partly in a Salary Offset Hearing Procedures manual which has not been formally published in the Federal Register but which is supplied to debtors who request review following receipt of HUD notices of intent to offset.[87] The petition must include a brief statement of the debtor's basis for disputing the debt or the offset percentage, and of the "facts, evidence and witnesses" supporting the debtor's position.[88] The hearing may be conducted by a HUD ALJ, an ALJ assigned by OPM, or a non-ALJ from some other agency.[89] In practice, all of HUD's salary offset hearings (about 34 over the course of a several year period) have been conducted by HUD's lone ALJ along with his other duties. The debtor may be represented by a person of his or her choice, while HUD is represented by a HUD attorney designated by the General Counsel.[90] The hearing manual also addresses a variety of minor procedural issues, including addresses for service of documents, disqualification of hearing officers to hear particular cases, and extensions of time for cause.

Strikingly, the regulations and hearing manual fail to explicitly distinguish between oral and paper hearings. There is no explicit recital of the FCCS standard for when an oral hearing is or is not required (or an alternative standard), and no provision calling for debtors to request an oral (or a paper) hearing. (There is a provision for summary judgment "without a hearing," but only "where there is no issue as to any material fact and one party is entitled to judgment as a matter of law.")[91] Generally speaking, the procedures in the hearing manual use language which assumes an oral hearing, without quite requiring one. For example, a discovery provision states that the hearing officer may require the parties to exchange a list of witnesses, with a summary of anticipated testimony, and undisclosed documents "each intends to introduce at the hearing."[92] Hearings are stenographically or mechanically reported. Witnesses are to testify under oath. Technical rules of evidence do not apply, but the hearing officer is to exclude evidence that is lacking in significant probative value or is merely repetitive or confusing. The hearing officer may allow arguments on admissibility using the Federal Rules of Evidence by analogy.[93]

Despite all the hearing manual provisions which appear to contemplate an oral hearing, the HUD ALJ has conducted all but one hearing on a purely paper record, and on several occasions, has denied a debtor's request for an oral hearing.[94]

In disputes concerning the debt, the hearing manual states that "The existence and amount of the debt must be proved by a preponderance of the evidence,"[95] which presumably puts the burden of proof on HUD, as creditor. In disputes over the offset schedule, the manual does not explicitly assign a burden of proof, but states that the hearing officer can modify the offset schedule if he or she finds "extreme financial hardship."[96] This, in practice, presumably places the burden of proof with respect to hardship on the debtor. The hearing manual includes a definition of extreme financial hardship, and the financial information to be considered, substantially identical to that in Department of Education regulations.[97] According to the HUD ALJ, the use of an objective, financial standard for hardship has contributed to his ability to reasonably decide hardship claims without the need for oral hearings.[98]

The hearing manual finally provides that the hearing officer is to issue a written decision, and that this decision constitutes final agency action, with no appeal within HUD.[99]

Administrative Offset

The HUD administrative offset dispute procedures generally follow the FCCS fairly closely, but provide some more detail on review procedures. The review is conducted by "the appropriate Deputy Assistant Secretary or designee."[100] According to a HUD attorney, the review is ordinarily conducted by a person knowledgable concerning the relevant program but not directly involved in the original decision concerning the debt.[101]

The HUD regulation provides that review can take two forms, "review of the record" and "hearing," meaning an oral hearing.[101a] In a review of the record, the reviewer "will review all material related to the debt which is in the possession of the Department" including material submitted by the debtor and "makes a determination based upon. . . this written record."[101b] This seems to suggest a bureaucratic review approach, although, if taken literally, it precludes the reviewer from asking questions of agency debt collection personnel. This would bring the process closer to a decision based on a defined and circumscribed record, as in adjudicatory style review.

The standards for holding a "hearing" are taken directly from the FCCS standards for when an oral hearing is required.[101c] A brief set of hearing procedures are set forth.[101d] There are no formal rules of evidence but parties may object to clearly irrelevant material. The hearing official "records all significant matters discussed at the hearing," but there is no official transcript or record. The debtor may be represented by the person of his or her choice, while the agency is represented by the HUD General Counsel or his or her designee. An order of presentation of evidence is set forth, with the agency going first, followed by the debtor, followed by agency rebuttal or clarification. The HUD "hearing" is thus a form of hybrid procedure, with a non-independent decision maker but a largely adversary form of fact finding.

c. Department of Health and Human Services

HHS takes a unified approach to offset, with salary offset, administrative offset, and several forms of offset not within the scope of the DCA all handled by the same regulation.[102] However, in some instances where the DCA draws distinctions between salary and administrative offset, such distinctions are incorporated in the agency procedures.

In HHS terminology, all offset disputes are handled via a "hearing," but "hearing" is defined to mean "either a review of the record or an oral hearing." "A review of the record" is further defined to mean "a review of the documentary evidence by a designated hearing officer." An "oral hearing" is defined as "an informal conference before a designated hearing officer."[103] The designated hearing officer is appointed by the Secretary of HHS (presumably by a designee) "to review and issue a final decision on an employee's dispute of a debt." Following the requirements of the DCA, if the dispute concerns salary offset, the hearing officer cannot be a person under the supervision of the Secretary. Ordinarily, in salary offset cases the hearing officer is to be an independent contractor or an employee of another agency, with ALJ's being used only as a last resort.[104]

The hearing will normally be a "review of the record" unless "the hearing officer determines that a decision cannot be made without resolving an issue of credibility or veracity."[105]

No procedural details are set forth for "review of the record." Brief procedures are set forth for oral hearings,[106] with allowance for both the debtor and the agency to be represented by counsel and for informal examination and cross-examination of witnesses. Only a summary record of the hearing is made. The regulation provide that the hearing officer will "Limit review of the case to the particulars of the agency determination challenged by the debtor."[107] This provision raises questions with respect to debtors who wish to assert counterclaims, argue that an agency collection action is outside of the agency's statutory or Constitutional authority, or make other wider-ranging arguments.

d. Small Business Administration

Another agency which takes a largely unified approach to salary and administrative offset dispute procedures is the Small Business Administration. In both types of cases a notice along the lines of that required by the DCA is sent.[108] However, a special notice is sent in salary offset cases if there exists some statutory provision authorizing waiver of the debt. In such cases, the debtor is provided with notice of the conditions under which waiver will be granted, and an opportunity to request such a waiver. Such a request is decided by the creditor agency. (In some cases there may be a right to appeal the creditor agency's decision to the SBA's Office of Hearings and Appeals.)[109]

In administrative offset disputes and other salary offset cases, the relevant DCA "review" or "hearing" is conducted by the SBA's Office of Hearings and Appeals (OHA), following the general SBA procedures for that office.[110] Consistent with the DCA, salary offset cases are decided by the OHA Chief Administrative Law Judge while administrative offset cases are handled by so-called "administrative judges."[111] These administrative judges are appointed by the Administrator of the SBA but, because they are located in the agency's OHA,[112] they are likely in practice to be reasonably independent of SBA debt collectors.

The SBA's OHA handles many disputes other than offset cases, and its procedures are set forth in a comprehensive and detailed procedural regulation, which includes the full panoply of procedures necessary for an APA trial type hearing on a record. However, the OHA regulation provides that the level of formality will depend on the nature of the dispute and delegates to the ALJ or administrative judge the power to determine, in many respects, the procedures to be applied in a particular case.[113] Nevertheless, even informal OHA proceedings are very clearly a form of adjudicative style review -- the decision maker is at least somewhat independent of the rest of the SBA bureaucracy and the decision is to be based on information contained in a docket file constituting "the exclusive record for decision."[114] OHA judges can take official notice of facts not in the record in their decisions, but must give affected parties an opportunity for rebuttal, if desired.[115] There are also rules against ex parte communications with agency employees who perform an investigation or prosecutorial function in connection with the proceeding.[116]

Parties may request oral hearings and the judge may grant the request if an issue of material fact "cannot be resolved except by confrontation of witnesses."[117] Oral hearings are recorded verbatim. All "reliable information" is admissible, but evidence can be excluded if its probative value is outweighed by prejudice or confusion or if it is needlessly cumulative. Parties can cross-examine witnesses and may be represented by attorneys.[118] Under the OHA regulations, discovery is in the discretion of the judge; however, the agency's offset regulations, following the DCA, give debtors access to debt records in the hands of the agency.[119] In offset cases, the decision of the OHA judge is the final agency decision.[120]

IV. Constitutional Requirements

It seems clear that the due process clause of the Constitution would ordinarily apply to the use of offset by the federal government. The concept of offset is that a debt owed to the government is applied against money owed by the government. In some instances the money owed by the government is the equivalent of an ordinary business debt. The government may offset against payment owed to a government contractor or against money owed to a bank pursuant to a federal guarantee. Alternatively, the money may be coming to the private debtor pursuant to an entitlement or grant program. However, in offset cases the debtor will have met the requirements of the entitlement program or have been awarded the grant.[121] Thus, in most, if not all, offset cases the private debtor will have an objective, legally grounded expectation of getting the money which the government is attempting to offset. Under modern due process concepts, a person with a firm, legally based expectation of receiving money from the federal government has a "property" interest within the meaning of the Fifth Amendment due process clause.[122]

Assuming the existence of a taking of property, the current controlling case on the general subject of what process is due in administrative contexts is Mathews v. Eldridge.[123] This case is usually cited for the analytical framework it sets forth; however, the case's holding on the facts is also relevant for the evaluation of offset procedures. The case dealt with terminations of eligibility for Social Security disability benefits. The initial termination decision was made by a state agency based on information from the recipient together with other medical records. If the recipient disagreed, he or she was given an opportunity to review the evidence, to respond in writing, and to submit additional evidence. The state agency then made a final decision, which was reviewed by an examiner from the federal Social Security Administration. If approved by the examiner, this final decision could be the basis for terminating benefits. Additional review, including an evidentiary hearing, was available post-termination.[124] In Mathews, the Supreme Court approved the pre-termination procedures as being a constitutionally acceptable prelude to termination of benefits.[125]

Taken as a holding on the facts, Mathews has several implications. Like earlier cases, Mathews makes clear that a full trial type hearing is not needed prior to all deprivations of property. Moreover, the particular procedures upheld in Mathews appear to have been a form of what we have called bureaucratic review rather than adjudicatory style review, so Mathews implies that bureaucratic review fulfills due process requirements in at least some contexts. It should be noted, however, that the Mathews court focused its analysis on the question of whether oral hearings were necessary to make accurate decisions regarding disability determinations. The due process elements we have suggested are key characteristics distinguishing bureaucratic and adjudicatory style review -- independence of the decision maker and use of adversarial fact-finding, received little explicit attention. The outcome of the case, however, implies that the Supreme Court did not view them as a necessary requirement for due process in all cases.

In addition to its holding on the facts of the Social Security disability program, Mathews set forth a general framework for evaluating what procedures are required by due process in particular contexts. The case calls for a weighing of three factors: (1) the private interest affected by the government action; (2) the risk of an erroneous decision under existing procedures and the probable value of additional procedural safeguards; and (3) the government's interest, including costs and administrative burdens of additional procedural safeguards.[126] Unfortunately, it is difficult to derive any general principles concerning offset procedures from the Mathews framework -- the factors assigned weight are likely to vary widely in different offset cases. For example, the private interest in an offset dispute is presumably the money owed by the government which is being offset.[127] This amount may vary from a few hundred dollars to tens of thousands of dollars in a typical salary offset case and up to several million dollars in an administrative offset case. Moreover, the due process cases do not treat all dollars owed by the government as equal, but take into account the needs of recipients.[128] Thus, the private interest in one thousand dollars in welfare payments to a poor person would count as a greater private interest than one thousand dollars owed to a large corporation. One thousand dollars in salary owed to a middle class civil servant or one thousand dollars in grant money owed to a community group with a tight budget would presumably fall in between, but the precise weighting is unclear. Similarly, the value and cost of additional procedures is likely to vary in different offset cases.

Several years after Mathews, the Supreme Court decided a due process case dealing with a form of administrative offset, albeit not under the DCA. Califano v. Yamasaki[129] dealt with the recoupment of Social Security overpayments by withholding future payments, pursuant to the Social Security Act. The practice of the Social Security Administration was to provide notice to recipients that the Social Security Administration had determined that an overpayment had been made. The recipient could then contest recoupment. The recipient could either argue that the Social Security Administration had made an erroneous determination or could request the Social Security Administration to forgive the debt pursuant to section 204(b) of the Social Security Act. Under section 204(b) and relevant regulations, the debt could be waived if the recipient was without fault and either needed the full future payment to pay for ordinary living expenses, or had detrimentally relied on the earlier overpayment.

Written requests for either reconsideration of the overpayment determination or waiver were referred to one of the Social Security Administration's regional offices for review before recoupment commenced. If the regional office rejected the request, recoupment would commence. The recipient would then have an opportunity for an on-the-record evidentiary hearing before a hearing examiner, but only after recoupment had commenced. While the decision does not go into detail about procedures, the pre-recoupment regional office review would appear to have been a form of what we have called bureaucratic review.[130]

In its holding, the court imposed differing procedural requirements, depending on the nature of the issues under review. For recipients who contended that no overpayment had been made at all, the regional office review procedure was constitutionally acceptable. Determination of proper payment levels was primarily a matter of computation based on more or less hard facts, in particular, recipient's earnings reports. Only rarely was credibility an issue, so oral hearings would not, in the generality of cases, reduce the risk of decisional error. Thus, under the Mathews framework, there was no call for an oral hearing.[131]

By contrast, the court held that recipients who admitted the existence of overpayments but requested waivers of their debts were entitled to pre-recoupment oral hearings. The court reasoned that the legal standards for waiver -- absence of fault in accepting payments and detrimental reliance -- would frequently raise issues of recipient credibility and that such credibility could not be adequately judged based on written submissions. The court asserted that its holding with respect to waiver requests was an inference from the statutory standard for waivers, not a constitutional requirement.[132] However, given that the statute was silent as to any oral hearing requirement, it seems likely that the court's distinction between requests for reconsideration and requests for waiver reflects constitutional due process concerns to at least some degree. Viewed as a due process case, Califano is consistent with the suggestion that application of the Mathews analysis can require different procedures in different offset cases.

One further complication in applying Mathews and Califano to pre-offset procedures is that in both cases, the pre-benefit termination and pre-recoupment procedures were supplemented by a right to more elaborate hearings following the relevant taking.[133] The presence of these additional procedures presumably influences the acceptability of the earlier more summary procedures, but the weight they carry is not made clear in the cases.

V. Offset Disputes in Practice

The Departments of Education and HUD are the major creditor agencies that appear to have made the greatest use of salary offset to collect general debts owed to the government. The 1982 "match" by the Department of Education led to the sending of 17,000 salary offset notices to U.S. government employees who owed money on student loans. Of these, about 300 requested review prior to offset. This gives a percentage figure of about 1.75%. Fewer than 50 debtors requested oral hearings. As of the summer of 1987, none of these requests for review had been heard because Education did not have available ALJs or other independent hearing examiners as required by the DCA. (Education was arranging to borrow personnel from the Veterans Administration for this purpose.)[134]

Precise information on the nature of the issues involved in the student loan salary offset appeals is not available. However, the Education official responsible for debt collection has stated that, in connection with student loan tax refund offsets (a program established independently of the DCA), about half of the persons asking for review contended that they simply did not owe the alleged debt. They had never taken out a loan, or they had paid it in full, or their loan had been discharged in bankruptcy.[135] It is sometimes suggested, plausibly, that student loans would rarely give rise to more complex legal defenses. However, this may be less true in the case of private vocational schools, which have fairly often been accused of fraud or other unfair practices.[136] Department of Education regulations provide that fraud and similar violations of consumer protection laws can be a defense to payment.[137]

Based on its 1984 match, the HUD title I program sent salary offset notices to about 1400 federal employees and generated roughly 50 requests for review, for an appeal rate of about 3.5%.[138] The appeals were handled by HUD's lone administrative law judge, who had produced some 34 decisions as of the fall of 1986. Dollar amounts of debt at issue in cases decided by the HUD ALJ ranged from $300 to $16,000, and averaged around $6500.[139] However, since salary offset is confined to 15% of disposable pay per pay period,[140] the time discounted dollar impact of the cases is smaller than is implied by the figures at the larger end of the range.

A review of a list of case issues prepared by the HUD Office of Administrative Law Judge indicates the following frequency of issues.[141] (Note that about 6 (of 34) cases involved more than one issue and are counted more than once in this breakdown.)

Petitioner failed to respond (no specific issues raised):	13 cases
Commercial/consumer law issues not related to warranties or repossession (e.g., Truth-in-Lending, forgery):	8
Claims of financial hardship:	5
Miscellaneous:	5
Defenses related to Uniform Commercial Code requirements for repossessions:	4
Defenses relating to responsibility of spouses for family debts, particularly following divorce:	4
Warranty related defenses	2

The listing of issues in cases decided by the ALJ is not completely representative of issues raised by HUD debtors requesting review because a number of debtor petitions were acceded to as obviously meritorious by the HUD general counsel's office, which represents HUD in salary offset hearings.[142] In connection with tax refund offsets, a HUD attorney estimated that a very high percentage (up to half) of requests for review prove to be clearly meritorious and are acceded to by the HUD general counsel. The reason why so many more requests for review are clearly meritorious in connection with tax refund offset than in connection with salary offset is unclear. A possible explanation is that the tax refund offset program involves considerably more debtors, and HUD collection officials may not be able to do as careful a job of avoiding errors.

Issues relating to repossession or warranties seem more likely to crop up in Title I loans than in other government lending programs since Title I loans are frequently used to purchase, and are secured by, mobile homes. Student loans, by contrast, are unsecured. It would appear that most of the other issues raised in the Title I cases could arise under other credit programs.

In only three cases did the ALJ grant debtors any relief. All involved commercial or consumer law defenses.[142a] In one case the entire debt was discharged, while the other two debtors had their debts reduced by several thousand dollars. It should be remembered, however, that several meritorious petitions were screened out by HUD attorneys and never reached the ALJ.

The HUD ALJ indicated in conversation with the consultant that he felt it necessary to hold an oral hearing in only one case, a case involving an allegation of forgery, where he felt the debtor's credibility was inherently at issue. He noted that claims of financial hardship in theory also inherently raised issues of debtor credibility, but that in practice written submissions had provided adequate bases for decisions. In two written opinions, neither involving hardship claims, the HUD ALJ formally rejected debtor requests for oral hearings.[142b]

Out of the 32 cases on which information was available, 20 were handled by the debtor pro se. These included one of the three cases in which the debtor obtained some relief, and eleven out of thirteen cases in which the debtor requested review and then submitted no meaningful case.

Administrative Offset

Because of the widely varied and often unsystematic use of administrative offset, and because handling of disputes is decentralized and informal at most agencies, it was not possible within the scope of this study to obtain systematic information about disputes in administrative offset cases. We will, therefore, give some examples, and make a few inferences based on the contexts in which administrative offset is used.

At the Small Business Administration, unlike at most agencies, requests for review of administrative offset are decided by administrative judges of the agency's Office of Hearing and Appeals who issue written opinions, providing a convenient source of information. As of the fall of 1986, four such opinions had been issued. Three involved attempts by the SBA to offset debts owed on SBA business loans against monies due the relevant debtors from the Agricultural Stabilization and Conservation Service. In one case, the debtor filed a petition for review in accordance with the SBA's regulations, but failed to follow up with any evidence or argument.[143] In a second case, the debtor's petition for review questioned SBA's authority to offset because offset was not mentioned in the debtor's loan contract nor was it explained by an SBA representative, and the debtor submitted no further evidence or arguments. In these two cases the debtors lost.[144] In a third case, described previously, the debtor acknowledged the existence of a debt but argued that the SBA should be estopped from applying an offset because it had earlier failed to make any response to a request to cooperate in a debt restructuring plan which allegedly would have made repayment of the loan possible. The SBA lost because it failed to answer the estoppel argument or to document the precise amount of the debt.[145] In a fourth case, the debtor argued that he had unsuccessfully attempted to contact SBA officials about rescheduling his debt[146] and that he anticipated submitting a repayment plan. The debtor lost, with the administrative judge observing that in the three months since receiving notice of offset, no rescheduling plan had been submitted.[147]

In the SBA cases just recounted, the administrative offsets grew out of rather straightforward debts - businesses borrowed money, signed promissory notes, and failed to repay the SBA. Unlike salary offset, however, administrative offset is often used in connection with less straightforward forms of debt, with their attendant possibilities for disputes. As noted previously, offset is frequently used in connection with debts arising out of failures of government contractors to perform as promised and failures of government grantees to comply with the terms of grants. Another example is the administrative offsets described in American Bankers Association v. Bennett.[148] This case involved banks who, in the course of ordinary banking operations, had improperly paid out money on federal government checks bearing forged or unauthorized endorsements. Under ordinary banking law, these banks were required to reimburse the U.S. Treasury. They often did so voluntarily but not always. The Treasury Department therefore requested the Department of Education to offset the amounts due against money owed to the banks pursuant to guarantees on defaulted student loans.[149] This offset program was enjoined by a U.S. District Court because of Education's failure to have proper regulations in place at the time of the offsets.[150] If it is resumed[151] it would obviously create potential legal and factual disputes concerning the existence of alleged forgeries and alterations and concerning the availability to banks of defenses under the Uniform Commercial Code or other banking law. In the Bennett case, the district court expressed concern that the Department of Education and the Treasury adopt procedural regulations which would make it possible for banks to meaningfully contest Treasury claims concerning particular checks.[152]

Administrative offset is often used in contexts where offset, and related disputes, are embedded in a broader dispute concerning the debt and thus in dispute resolution systems other than those established specifically in connection with DCA offsets. The major examples are the use of offset to collect debts arising out of the failure of government contractors and grant recipients to fulfill their obligations. The relevant contractor or recipient will often dispute the government's contention that they have violated contract or grant terms. Such disputes are covered by a well developed body of law and procedures for dealing with contract disputes[152a] and, depending on the agency, a more or less well developed system for handling grant disputes.[153] Administrative offset may be embedded in broader disputes in other situations as well. For example, the Department of Education was litigating claims in federal court against a private vocational school business owned by a conglomerate corporation. According to Education, the schools had violated student loan regulations and therefore were required to return loan guarantee payments previously received. To increase pressure for a favorable settlement in the court litigation, Education reportedly requested the Defense Department to offset Education's claim against money due the conglomerate on defense contracts. The conglomerate eventually went bankrupt, bringing the bankruptcy court system into play as well.[154]

VI. Policy Issues

A. Formality and Effectiveness of Procedures in Salary Offset Cases

The requirement for a "hearing" prior to use of salary offset and the further requirement of the use of ALJ's or other fully independent hearing officials potentially raises the spectre of overly formal and complex proceedings interfering with an efficient debt collection program. The sixty-day time limit established by the DCA was presumably the result of such fears. In any case, the limited experience to date suggests that in connection with major government credit programs, the salary offset dispute procedures do not pose serious problems for the collection system. (Whether the DCA procedures are overly burdensome in connection with routine pay adjustments is a different issue, on which this study did not produce sufficient information to make recommendations.) Experience at HUD and the Department of Education indicates that under 5% of persons receiving salary offset notices requested review. (By contrast, during the 1970's, an average of something like 20% of all claims for Social Security Disability Benefits were appealed.)[155] Experience at HUD suggests that the resulting proceedings are themselves manageable. HUD's single ALJ was able to handle all the hearings resulting from a fairly large federal credit program along with his other duties. In only one case was an oral hearing held. To further warm the hearts of government debt collectors, in only three cases did debtors obtain relief from the hearing process. (As noted above, this last statement is slightly misleading, since several debtors obtained relief from the HUD general counsel's office with no hearing.)

With what techniques, and at what costs were these happy (from a collector's perspective) results achieved? First, it should be noted that none of the cases were "big cases" involving very complex legal and factual issues. On the other hand, many of the cases did require some substantive legal and factual analysis. For example, one not atypical case turned on the question of whether defects in a mobile home, and the debtor's actions in response to those defects, met the requirements for a "revocation of acceptance" under Uniform Commercial Code section 2-608 and relevant state caselaw.[156] In any case, the absence of "big cases" is likely to be typical of salary offset disputes, involving, as they do, what are essentially consumer loans.

One obvious contributor to the efficiency of the process was the HUD ALJ's eschewal of oral hearings in all but one case. Many of the cases involved factual allegations by the debtor, raising a question as to whether oral hearings should have been held to permit evaluation of credibility -- either because such hearings are required by the FCCS or simply as a matter of good practice. One technique that the HUD ALJ often used, which may have helped to avoid oral hearings, was to accept debtor factual allegations at face value. For example, in claims of financial hardship, the HUD ALJ sometimes made calculations using dollar figures supplied by debtors without questioning the veracity of those figures.[157] In another case, the HUD ALJ found the existence of a warranty in part based on a debtor's allegations concerning a salesperson's oral representation.[158] It is not clear that HUD collectors suffered in practice from the HUD ALJ's frequent acceptance of debtor allegations' face value. Even in a full trial type hearing it is likely that it would have been difficult or, at a minimum excessively costly, for the HUD general counsel to locate witnesses concerning old sales transactions or debtor finances, and thereby to participate in, much less win, swearing contests on such issues. The win-loss record in HUD salary offset hearings further suggests that HUD's interest as creditor is not being seriously impaired. It might be objected that experience so far reflects relatively short-run experience, and that failure to more vigorously test debtor statements would in the long run lead to widespread lying. There are some checks on this potential problem, however. Debtors in salary offset hearings are a dispersed group and are unlikely to learn much about other debtors' experiences. (Some attorneys may develop experience in the area but it seems unlikely to become a significant field of practice.) In addition, the HUD ALJ felt he could get some fairly good sense of debtor credibility from the way debtors' paper evidence and allegations hung together. While oral hearings might have increased the accuracy of credibility determinations, the HUD ALJ felt the additional cost was probably not worth the incremental improvement, in light of the modest dollar magnitude of the cases.[159]

To what extent does the use of purely paper proceedings, together with the DCA's tight 60-day time limit, affect the fairness and legal craftsmanship of the decision process? An ALJ with offset dispute responsibilities at one agency expressed concern that the time limit would make it difficult to handle cases with any significant degree of legal complexity. A subjective impression from the HUD written decisions is that the HUD ALJ was able to do a reasonable job. The decisions generally read like good quality state court opinions in cases of less than first importance. In areas of law where the consultant has expertise, there are no obvious errors, and the decisions generally confront, to at least some degree, the legal and factual issues one would expect to arise in cases of the relevant sort. One technique which may have contributed to the ability of non-oral hearing procedures to adequately develop issues is that in many cases there were written rebuttals and surebuttals by the parties. In some cases there were direct requests for additional evidence by the ALJ. (Judges at the SBA Office of Hearings and Appeals have also requested parties to submit needed evidence in adjudicatory style non-oral offset hearings.)

B. Ability of Debtors to Participate Effectively in Salary Offset Hearings

The most disturbing aspect of the HUD salary offset dispute experience is that over a third of debtors requesting a hearing never submitted a case for themselves and, in effect, lost by default. (A similar problem was observed in several SBA administrative offset cases.)[160] This raises a question as to whether HUD's procedures (which are not atypical), simple as they are in practice, are beyond the capabilities of a significant number of debtors. To be more concrete, are a significant number of debtors unable to effectively put together and submit a case for themselves in writing?

There is reason to suspect that the visible HUD experience both overestimates and underestimates the problem. On the one hand, some or all of the defaults may have been non-meritorious cases. One would expect some number of debtors to request hearings in bad faith, or simply out of anger or frustration, and not follow through. On the other hand, the HUD information is confined to debtors who were sufficiently adept to request a hearing. Presumably, some number of debtors who failed to do so also had meritorious, or at least colorable, defenses to payment.

Assuming that some significant number of debtors with meritorious claims are unequipped to effectively participate in the salary offset dispute process as it has been established, can anything be done to improve the process in this respect? One possibility is a shift from an adjudicatory to a bureaucratic review model, which at least potentially puts less reliance on the ability of debtors to assemble and present a case. The appropriateness of bureaucratic review in offset disputes will be discussed in more detail below. Here, we will simply observe that the potential effectiveness of bureaucratic review in compensating for weaknesses of debtors as advocates is greatest where the issues raised by debtors involve facts that are in the hands of the agency. Thus, for example, to the extent that debtors allege simple errors on the part of government collectors (e.g., mistaken identity, failure to credit payments already made), bureaucratic review may have advantages. As noted previously, Department of Education and HUD experience with tax refund offsets suggests that many requests for review involve such claims of simple errors. On the other hand, the caseload of the HUD ALJ suggests that many debtors allege defenses based on facts not in the possession of the collecting agency. With respect to such defenses, a bureaucratic review process would still, in practice, depend heavily on the ability of debtors to assemble and present a case for themselves.

Another possible alternative would be to increase the use of oral hearings on the theory that some unrepresented debtors will be better able to present a case orally than in writing. For this purpose, something more like an informal conference than a trial-like hearing would seem appropriate. There are, however, severe practical limitations to this. Extensive use of oral hearings would obviously increase the resource demands of the dispute process. It might make it difficult to meet the 60-day time limits of the DCA and increase the chances that dispute handling would disrupt collections. It would also impose costs on debtors, since attending a hearing could require time off from work and possibly travel. (In the one oral hearing held by HUD, the Washington based ALJ personally drove to the debtor's location in New Jersey.[161] Such service could probably not be provided to debtors on a regular basis, however.) As a substitute for oral hearings, agencies might experiment with telephone hearings, or some sort of informal telephone "prehearing conference"[162] to identify issues a debtor may not have effectively presented in writing.

C. Choice of Adjudicatory Style or Bureaucratic Review as a General Approach to Deciding Offset Disputes

From a traditional lawyer's perspective, adjudicatory style review comports better with conventional notions of due process than does bureaucratic review. From this perspective, the latter suffers from at least two serious deficiencies. First and foremost, in bureaucratic review, an agency unit is, in effect, acting as a judge in its own case. In a well set up bureaucratic review system, an original determination is likely to be reviewed by different individuals from those who made it, but the reviewers will still be part of the same organization, with similar values, interests, and institutional ties.

A second disadvantage of bureaucratic review in terms of due process values is that, as usually conducted, it gives private parties less of a creative role in developing and presenting their case to decision makers than does adjudicatory style review. The extent to which this is true, of course, depends on the precise adjudicatory and bureaucratic procedures followed. Perhaps more importantly, scope for creative case development and presentation is an advantage primarily for well represented parties in cases of large enough magnitude to warrant a substantial investment in litigation.

In any case, bureaucratic review has a number of countervailing advantages likely to be of significance in government debt collection cases. First, bureaucratic review procedures are likely to be cost-efficient -- little in the way of special arrangements need be made to conduct a review. Bureaucratic review also has the potential to produce better informed decisions than those by an independent adjudicator. The bureaucratic reviewer would presumably have ready, informal access to all information available to the agency, along with expertise useful in identifying relevant information and interpreting it. For this reason, bureaucratic review has the potential to partially compensate for deficiencies in the ability of ordinary debtors (or in some instances agency debt collectors) to present effective cases for themselves in an adversary proceeding. (This would be primarily true, however, in cases where key facts were available, at least in implicit form, in agency records.)

The potential advantages of bureaucratic review, however, only materialize if such review can be carried out with a reasonable level of impartiality. Arguably, the debtor-creditor context inevitably creates an adversary stance which makes impartiality difficult to achieve. There is, however, some reason to think that a reasonable level of impartiality may be achievable in at least some debt collection programs. Experience at the Department of Education and HUD suggests that in mass credit programs the percentage of debtors requesting offset review is small enough so that collection officials can "afford" to be fair, without having a major impact on collection goals.[163] This observation is consistent with a subjective impression obtained in interviews with several government collection officials.[164] These officials seemed to give little priority to the offset disputes issue, one way or another (as compared to the attention they gave to such things as setting up efficient computerized dunning systems), because offset disputes had only a limited impact on their "bottom line." However, perhaps for precisely this reason, these officials seemed willing to accommodate debtors with good legal defenses or other good reasons for not paying. A related factor is that in some government credit programs a commitment to the broad mission of the program (e.g., helping regional economic development, helping the poor improve their housing, etc.) creates a degree of understanding for debtors on the part of officials with responsibility for collections.[165] It seems possible that, overall, the likelihood of impartiality may be greater in mass, consumer type credit programs than in other contexts. This would be true because the dollar amount in any given dispute would be modest, making fairness "affordable." In addition, individual debtors may be more likely to evoke understanding than organizational debtors, although this will not always be true. For example, a student loan defaulter holding a well paying government job is a paradigm of an unsympathetic debtor. In addition, collection officials interviewed for this project mentioned several types of organizations likely to receive sympathetic treatment by some agency collectors.[166]

It seems likely that the relative merits of bureaucratic and adjudicatory style review will vary depending not only on the nature of the debtor, but also on the nature of the dispute. Empirical evidence does not appear to be available, but some intuitive judgments are possible. For one thing, adjudicatory style review may work better in disputes over larger debts because the money at stake will justify better case development by adversary parties than in smaller cases. One can also make a rough breakdown of offset disputes based on the nature of the debtors' contentions:

1. Claims of simple error by the government. This category includes contentions that a debt is not owed (or the full amount claimed by the government is not owed) for some reason that is conceptually simple, and, in principle, readily verifiable. Examples would include claims that a debt was already paid or discharged in bankruptcy, or claims of mistaken identity concerning the debtor.

2. Hardship and equity claims. This would include arguments that the government should waive all or part of a debt or the use of offset because of financial hardship to the debtor or because of some other fairness consideration.

3. Dilatory claims. This would include cases where the debtor has no real basis to dispute the debt or the use of offset, but requests review for delay purposes.

4. Substantive disputes. This would include instances in which there is some more or less complex legal or factual reason for contending that a debt is not owed that does not fall within category 1. For example, a debt might arise out of the government's determination that grant money was improperly spent, and the debtor might dispute this, based on accounting data or arguments concerning the meaning of the terms of the grant. Assertions of defenses to payment based on consumer protection or commercial law principles would be other examples.

Bureaucratic review, if conducted in good faith, would appear to be most satisfactory in cases alleging simple error. In many such cases, review of government collection records (or other objective and readily available sources such as bankruptcy decrees) would be an efficient method of evaluating such allegations. In addition, the relatively objective nature of the determinations to be made would minimize the effects of unconscious bias.

Again assuming good faith, bureaucratic review would appear to be a satisfactory way of dealing with claims of hardship and meritless, dilatory claims. This is particularly true to the extent that agency regulations have translated tests of hardship into objective economic criteria. On the other hand, bureaucratic review would not appear to have great advantages over adjudicatory style review with respect to these categories of claims. Proper disposition of hardship claims would be based primarily on information supplied by the debtor, not information in agency records, while dilatory claims would presumably reveal themselves primarily by the failure of the debtor to present a meaningful argument.[167]

Bureaucratic review intuitively seems least satisfactory relative to adjudicatory style review in connection with relatively complex substantive disputes. Such disputes, by their nature, are likely to require case development by debtors -- one can expect agency collection officials to recheck if payments were received or if a debtor's identity was confused, but not to construct a Truth-in-Lending counterclaim or a warranty defense on behalf of a debtor. The extent to which information needed to resolve substantive disputes is found in agency collection records is likely to vary. In many instances, material facts will probably not be in the hands of the agency; for example, if a HUD Title I debtor asserts a breach of warranty by a private home improvements contractor as a defense to payment of a bank loan later assigned to HUD pursuant to a guarantee. In other cases, the agency may have access to material facts but have a vested interest in a particular interpretation; for example, if an offset arises in connection with a contract or grant dispute. More generally, the greater role of judgment in evaluating complex disputes gives greater opportunity for unconscious bias to affect decisions than with respect to simple error claims. In sum, the role of the decision maker in a substantive offset dispute seems more like that of a judge than an administrator, making adjudicatory style procedures seem relatively more appropriate.

The upshot of the considerations just reviewed is perhaps paradoxical. Bureaucratic review would appear to function best in the context of salary offset, a context involving small debts, individual debtors, and a high percentage of simple error or hardship claims; while adjudicatory style review would appear to function best in the context of administrative offset, where debtors are usually organizations, dollar amounts at issue are often large, and disputes may involve complex substantive issues. Yet agency regulations, with encouragement if not compulsion by the DCA,[168] have generally adopted adjudicatory style procedures in salary offset cases and bureaucratic review procedures in administrative offset cases. Should the general approach to offset review be reversed?

On balance, available information does not warrant such a recommendation, but only a recommendation that limited elements of bureaucratic review be added to existing salary offset procedures. In part, this is simply a counsel of caution -- there is still only limited experience with any existing DCA procedures, and this consultant was able to obtain particularly little information on experience with administrative offset procedures. However, a number of more positive assertions can be made.

With respect to salary offset, the sensitivity of offsetting individuals' wages suggests preserving the DCA requirement for an independent decision maker and other minimal adjudicatory elements in order to enhance the legitimacy of the offset dispute process.[169] In addition, at HUD at least, the existing system has so far produced reasonable quality decisions, without being too costly or interfering excessively with overall collections.

The apparent difficulty of some debtors in participating in adjudicatory proceedings, however, suggests supplementing such procedures with a "bureaucratic" component. At some point or points in the dispute process, an agency official should take some initiative to evaluate whether a complaining debtor has a good case. A number of such actions could be taken without incurring excessive costs or substantially delaying or disrupting collections. Examples might include thoroughly and sympathetically evaluating agency records to see if they support inartfully presented debtor contentions, and telephoning debtors who have requested offset review and not followed up with a written case on their behalf.

Such informal mechanisms of bureaucratic review are already implicit in the collection and offset system. For example, prior to offset, debtors are often subjected to telephone collection efforts. Agency collection manuals direct telephone debt collectors to inquire as to why debtors have not paid.[170] To the extent that agencies seriously evaluate debtor contentions that a debt is not due, a review component is built into the collection process. Somewhat similarly, it was mentioned previously that at HUD attorneys representing the agency in offset proceedings will sometimes determine that debtor contentions are clearly meritorious and agree not to proceed with offsets. Conceivably, this informal review function could be expanded, and might include some telephone consultation with debtors or other inquiries. Agency collectors, and litigators, however, cannot be expected to be completely impartial,[171] so it is possible that some debtor outreach/informal claim investigation activity should be carried out by the independent hearing officials mandated by the DCA, or by personnel attached to them. Such outreach might be as limited as telephone or similar follow-up when debtors appear to be having trouble dealing with the adjudicatory process; for example, when an unrepresented debtor submits a complaint letter requesting review, but does not follow through within the regular hearing procedures. Clearly, these suggestions for change are marginal, but marginal adjustments are quite probably all that is called for.

These suggestions for informal use of elements of bureaucratic review procedures may be compared with the Department of Education's offset review procedures as described above.[172] The Department provides for a first review stage using bureaucratic review procedures and a second stage using more adjudicatory style procedures. While constituting a thoughtful approach, the Department's procedures are not fully responsive to the concerns raised here. First, the bureaucratic review elements are not focused on the problems of debtors who have limited capabilities for participating in adjudicatory procedures.[173] Second, as discussed above, the limited substantive scope of the Department's second stage procedures does not give debtors the full potential advantages of an adjudicatory style proceeding.

We now turn to the question of whether agencies using bureaucratic review procedures for administrative offset disputes should shift to more adjudicatory style procedures. A major reason for not making such a recommendation is that the use of administrative offset is often embedded in larger disputes between government agencies and debtors; for example, in connection with grants or contracts.[173a] This has two implications. First, the larger dispute context will often carry with it its own opportunities for review, e.g., through the agency grant or contract dispute process, providing at least a partial substitute for adjudicatory style review in the narrow context of the offset attempt.[174] At the same time, adding an additional adjudicatory style proceeding could complicate what might already be a complex litigation/negotiation situation and unduly interfere with the ability of the government to use offset as part of its overall collection strategy.[175]

D. Res Judicata and Collateral Estoppel Effect of Decisions in Offset Disputes

An attempt to collect a debt by salary or administrative offset may not be the end of the government's collection effort. This could be true if the offset attempt is unsuccessful or if the amount offset simply doesn't cover the entire debt. The government might then continue informal dunning efforts, or go to court to obtain and execute a judgment against the debtor. In some instances, a new opportunity for offset may arise, for example, if a new debt by the government to the debtor is generated.

What should be the effect of a decision under the DCA offset dispute procedures on subsequent collection activities and associated administrative or court proceedings? Issues of this sort were addressed by the Comptroller General in a letter opinion concerning J. Michael Tabor,[176] an employee of the Department of Energy who was originally based in Dallas. He received over $30,000 in travel and subsistance reimbursements for an 18-month temporary duty stint in Washington, D.C., where he ultimately remained permanently. In a 1983 decision, the Comptroller General determined that the 18-month stint was not truly temporary duty and that Tabor was obligated to return the $30,000. The Department of Energy attempted to collect the debt through salary offset, but at a pre-offset hearing a Department of Energy administrative judge determined that the debt was not established. The Department of Energy then requested an opinion from the Comptroller General as to whether the debt could be removed from the books and whether the Department was relieved of responsibility for recoupment of the funds. The Comptroller General acknowledged that the administrative judge's decision precluded collection by salary offset, but felt that it did not extinguish the debt. The Comptroller General gave two primary reasons for its decision.[177] One is tied to the specifics of the case. The administrative judge confined the scope of the offset hearing to three issues specifically mentioned in the Comptroller General's 1983 decision and the Department of Energy's pre-offset notice to Tabor. As a result, according to the Comptroller General, the administrative judge failed to address several reasons why Tabor's duty was not temporary and the debt was proper.[178]

The more general reason given by the Comptroller General was that the legislative history of the DCA "shows that Congress intended salary offset to be one among many [debt collection] tools. . . . While the [salary offset] hearing was designed to afford due process in connection with a proposed salary offset, there is no indication in the [statutory] language. . . or in the legislative history of the 1982 Act that the hearing would have consequences outside of the specific context of salary offset."[179]

On the other hand, the DCA does not specifically state that decisions in salary and administrative offset reviews are not to have broader impact. It therefore seems useful to examine the issue from the perspective of general principles of administrative res judicata and collateral estoppel.

It is well established that res judicata and collateral estoppel principles can apply to administrative decisions, but courts often state that such application should be more flexible than with respect to court judgments.[180] The primary requirement is that the administrative proceeding, "entail the essential elements of adjudication,"[181] and afford a "full and fair" opportunity for parties to litigate.[182] Application of these principles by courts varies, with some courts seemingly requiring procedures close to those of a traditional trial and others granting preclusive effect to quite informal proceedings.[183] In addition, court decisions and the Restatement 2d of Judgments suggest that a variety of additional policy considerations should further limit preclusive effects of administrative decisions in some circumstances.[184]

The issue of the scope of the effect of offset dispute decisions can be divided into three distinct, though related, questions:

1. To what extent should the decision be viewed as res judicata, in other words an authoritative legal decision which is binding on the agency and debtor and which precludes relitigation in subsequent court or administrative proceedings?

2. To the extent that decisions do not have a res judicata effect, should determinations with respect to particular issues have a collateral estoppel effect in any subsequent court or administrative proceedings with respect to the relevant debt?

3. To the extent that decisions do not have a res judicata effect, should agencies nevertheless conform their behavior to the determinations made in the offset dispute proceeding? For example, suppose in an offset dispute the decision maker decides that the offset is improper because the underlying debt is invalid. Should the creditor agency not only refrain from offset but also from all other collection activities?

Res Judicata Effect

Clearly, offset dispute decisions, once final, should have res judicata effect with respect to the offset attempt giving rise to the dispute. Otherwise, the statutory procedures would be meaningless. Should, however, offset dispute decisions be treated as legally binding with respect to (a) all future handling of the relevant debt, or (b) future attempts at offset in connection with the debt?

The answer to (a) should probably be no, for several reasons. In some instances, the offset decision by its own terms may be confined to issues relating to the propriety of the particular offset and address the validity of the underlying debt. More broadly, as the Comptroller General noted, the statutory provisions on review prior to offset are tied specifically to the statutory provisions on offset themselves.[185] This consideration seems the more compelling since in the case of some debts, for example those connected with contracts and grants, statutes or regulations provide for other administrative proceedings to determine the validity of the debt.[186] Another consideration is that offset dispute proceedings are clearly intended to be simple and expeditious. The comment to section 83 of the Restatement 2d of Judgments suggests that the provision of expeditious proceedings implies an intent that the stakes in such proceedings be limited to the narrow issue at hand.[187]

Offset dispute decisions should be considered res judicata with respect to later offset attempts. Except in the case of very small debts, salary offsets inevitably involve a continuing deduction from a stream of future paychecks.[188] It therefore seems appropriate to view future salary deductions as inherently implicated in any salary offset dispute, and to treat the result of the dispute proceeding as res judicata with respect to future salary offsets for the same debt.

Administrative offsets pose a more difficult question since it is sometimes reasonable to view separate offsets with respect to the same debt as distinct occurrences. Suppose debtor X owes $1 million to agency A. In 1987 X becomes entitled to a $100,000 payment from agency B, and agency A attempts to offset the money. Then, in 1989, X becomes entitled to a $50,000 payment from agency C. At the time of its 1987 decision to collect by offset, agency A may not have known about the 1989 payment; indeed, X's entitlement to it may not have yet come into being.

Despite this possibility, it seems appropriate to treat the initial offset dispute decision as res judicata with respect to subsequent administrative offsets. The debtor suffers no deprivation in terms of procedural quality, since the effect of res judicata would be simply to deprive the debtor of a second chance at the same procedures provided in connection with the initial offset. Res judicata status would increase the stakes at issue in the initial dispute proceeding, but the stakes would still be relatively limited, since they would be confined to potential future offsets.

Most importantly, the policies favoring finality of decision and nonduplication of procedures seem particularly strong in connection with repeated offset attempts. It seems highly desirable in efficiency terms for agencies to be able to complete the DCA offset despite procedures and, assuming that the claim has been established as valid, proceed to offset against payments when and where possible, without having to repeat the same procedures for each offset opportunity. Conversely, a debtor who has successfully disproved a claim in connection with one offset attempt should not have to fear future offset attempts.

This position appears consistent with the DCA offset provisions. 31 U.S.C. Section 3716(a) states that administrative offset can occur "only after giving the debtor. . . review. . . of the decision of the agency related to the claim." The use of the word "after," and the reference to review of a decision "related to the claim," as opposed to the offset, seem consistent with allowing review to occur once, in connection with the establishment of the claim, as opposed to repeating review in connection with each offset attempt. Other language of section 3716(a) is similarly at worst ambiguous with respect to the recommended position. The notice requirement of section 3716(a)(1) refers to notice of ". . . the intention of the head of the agency to collect the claim by administrative offset. . . ." Conceivably this provision requires notice of intent to offset particular funds, but the language also seems consistent with giving notice of the agency's general intention to collect by offset when and where possible.

A related point is that agencies should be able to harness existing claim dispute procedures (for example those established in connection with government contracts and many grant programs) for purposes of compliance with the DCA. This position is taken by FCCS section 102.3(b)(2)(ii) which provides that,

> In cases where the procedural requirements. . . have previously been provided. . . in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, the agency is not required to duplicate those requirements before taking administrative offset.

In general, existing procedures are tied to the establishment of the claim, and not to a particular collection attempt.[189] Therefore, to use them as the "opportunity for review within the agency" for DCA purposes, it must be possible for the DCA "opportunity for review" to occur only once in connection with any one claim. Requiring DCA review to be repeated for each offset attempt would make it considerably more difficult, if not impossible, to integrate DCA offset procedures with other claim dispute resolution mechanisms.

Collateral Estoppel Effect in Subsequent Court or Administrative Proceedings

Suppose an agency attempts to collect a $10,000 debt by offset and the decision maker in a dispute proceeding decides there can be no offset because the debtor has a legal defense to payment. Assuming that the decision is binding only with respect to offset, the agency sues the debtor in court to attempt to collect. Can the debtor assert the earlier decision on the specific issue of the validity of the defense in the court proceeding, under the doctrine of collateral estoppel? Note that a similar issue could arise in reverse. If the government won with respect to the offset but nevertheless sued the debtor in court (e.g., because the offset amount was inadequate to pay the debt), would the debtor be precluded from relitigating the alleged defense to payment?

A variety of reasons militate against giving collateral estoppel effect to offset dispute decisions and, while no single one is definitive, taken as a whole they suggest giving no collateral estoppel effect. First, the reasons given above for not treating the offset dispute decision as res judicata with respect to the debt are also relevant to the collateral estoppel issue. In addition, courts have generally been more willing to give collateral estoppel effect to administrative proceedings to the extent that the procedures followed are similar to those of courts, although how strictly courts apply this principle varies widely.[190] Procedures in offset disputes differ quite substantially from court procedures. This is particularly true with respect to the bureaucratic review procedures often used in administrative offset cases, but is also true of the relatively informal forms of adjudicatory style review typically used in connection with salary offset. A related point is that incentives for parties to fully litigate with respect to an offset (which may be for an amount smaller than the debt) will often be smaller than with respect to a subsequent proceeding on the entire debt.[191]

The factors militating against collateral estoppel will also be present with respect to subsequent administrative proceedings with respect to the debt, although the difference in procedural quality may be smaller, or, in some instances, nonexistent. With respect to subsequent offsets, the question of collateral estoppel should not arise if the results of offset dispute procedures are viewed as res judicata for all offsets in connection with the original claim. In any case, the arguments favoring res judicata with respect to future offsets would also apply to collateral estoppel.

Informal Collection Activities

It was suggested above that the res judicata effect of decisions in offset disputes should be confined to offsets. Therefore, a decision that a debt was not valid would not legally obligate agencies to refrain from subsequent collection activities. This conclusion is consistant with the position of the Comptroller General in the J. Michael Tabor case, described above.

Arguably, however, in many instances agencies should voluntarily abide by decisions in offset disputes concerning the validity or magnitude of underlying debts, and restrict their collection activities accordingly. The reasons for doing so are to maintain an appearance of fairness and avoid the need for (alleged) government debtors to repeatedly reargue their positions. These considerations seem most compelling with respect to private individuals. At the same time, debts owed by private individuals are likely to be relatively small, so the cost of acquiescing in offset dispute decisions is likely to be small. This suggests that government agencies should, except in unusual circumstances, conform to offset dispute decisions with respect to underlying debts where the debtor is an individual and the debt is relatively small. A similar policy should be followed with respect to non-individual debtors, but the presumption in favor of conforming to offset dispute decisions could appropriately be weaker. One circumstance in which the presumption in favor of conforming may be rebutted is where proceedings with respect to the validity of a debt other than an offset dispute proceeding either have occurred or are expected to occur. In such circumstances any expectation concerning the finality and exclusiveness of the offset dispute proceeding would be greatly reduced.

One difficulty with this proposed policy is that there is no general authority on the part of government agencies to waive debts owed to the government.[192] The Federal Claims Collection Act authorizes agencies to terminate collection efforts on debts up to $20,000, but only for specified reasons, not including general fairness considerations.[193] On the other hand, agencies are presumably not required to collect debts that are not owed.[194] Agencies could perhaps adhere to the suggested policy consistently with the Claims Collection Act by adopting decisions in offset cases as the agency's determination with respect to the underlying debt, unless there is some other more authoritative determination with respect to the debt already in existence.

VII. Relationship of the DCA to Offsets in Government Procurement Contracts

As noted previously, perhaps the heaviest use of administrative offset to collect debts has been in connection with debts arising out of government contracts. This has been true since long before the adoption of the DCA. Disputes concerning government contracts for the procurement of goods and services are governed by the Contract Disputes Act (CDA) of 1978,[195] together with relevant provisions of the Federal Acquisition Regulation (FAR),[196] individual agency regulations,[197] and a body of specialized judicial and administrative case law.[198] While the CDA and FAR are not strictly incompatible with the provisions of the DCA and FCCS concerning offset procedures, the mesh between the two bodies of law is at best unclear.[199] The Justice Department and attorneys for the Department of Defense have taken the position that provisions of the DCA on administrative offset procedures do not apply at all to disputes covered by the CDA.[200] There has been litigation on the issue, but no definitive court decision. The Justice Department has also given consideration to introducing legislation to exclude government procurement contracts from the coverage of the DCA offset provisions.[201]

It is, in fact, possible to identify at least four possible classes of situations in which the issue of the interaction of the DCA and CDA can arise, although some classes are of greater practical significance than others. The classes are:

1. Inter-contract offset. Suppose a private party provides goods or services to the government pursuant to contract A. Suppose also that as a result of its work on contract A, the contractor allegedly owes money to the government. For example, the government might allege that damages are owed for a breach of warranty. The contractor later properly performs work pursuant to contract B, and submits an invoice for payment. The government attempts to collect the debt from contract A by offsetting against money owed on contract B.

2. Intra-contract withholding of payment. The government withholds full payment on a contract, alleging that the contractor failed to properly perform. It is questionable whether this should be considered an offset, but some contractors have argued that it is because the government is offsetting the amount of its alleged damage against the contract price.

3. Non-contract debt, contract offset. A private party incurs a debt to the government in a transaction not involving a procurement contract covered by the CDA. The government attempts to collect by offset against money due the party on a properly performed procurement contract. The LTV case, described above, is an example.[202]

4. Contract debt, non-contract offset. The government attempts to collect a debt arising out of a procurement contract by offsetting against a

payment due to the debtor for reasons not connected with a procurement contract.

Of the four classes of possible cases, cases 1 and 2 are by far the most common in practice. In addition, the government does not at present appear to be taking the position that cases 3 and 4 are excluded from the application of the DCA offset provisions. The discussion below will therefore focus primarily on cases 1 and 2, especially case 1, which is at the center of current controversy.

A. Current State of the Law

1. Application of DCA to Contract Disputes

Neither the DCA administrative offset provisions, nor the Federal Claims Collection Act generally, contain language specifically including or excluding coverage of debts arising out of government procurement contracts. There appears to be no explicit legislative history on the subject either. Thus, the basic case for applying the DCA to government contract debts is that the plain language of the DCA applies to debts in general, and there is no statutory basis for excluding contract debts. This position is reinforced by the fact that the DCA explicitly excludes certain classes of debts, suggesting an intent to cover debts not explicitly excluded.[203]

The core of the Justice Department's argument that the DCA offset provision does not apply to government contract disputes is that Congress enacted the 1978 Contract Disputes Act as a comprehensive procedural statute governing contract disputes. According to the Justice Department, the comprehensive nature of the CDA creates a strong presumption that later legislation was not intended to add to CDA procedures. Therefore, the silence of the DCA with respect to transactions covered by the CDA should be viewed as reflecting an intent that DCA procedural requirements not cover such transactions.[204]

There are, as of July of 1987, no court holdings on the application of the DCA to the use of offset in inter-contract offset cases (class 1 in the listing set forth above). There are, however, several decisions of the Armed Services Board of Contract Appeals (ASBCA) holding squarely that the DCA does apply to the use of offset in such cases.[205] The ASBCA relies primarily on the fact that the DCA by its terms applies to government claims across the board, and that it explicitly excludes some forms of offset, but not government contract offsets.[206]

The result has been different in cases involving withholding of payment within the confines of a single contract. Both the ASBCA[207] and the United States Claims Court[208] have distinguished intra-contract withholding from inter-contract offset, on the theory that intra-contract withholding does not involve an attempt by the government to collect a monetary debt within the meaning of the DCA. In the words of the Claims Court, "It is refusal to pay money which [the contractor] has not yet earned. . .; it is not recovery of money [the contractor] owes the government."[209]

While the analysis of intra-contract withholding by the ASBCA and Claims Court has been challenged by some,[210] distinguishing between inter- and intra-contract cases for DCA purposes seems sensible. On its face, inter-contract offset as a practice is essentially equivalent to forms of administrative offset clearly covered by the DCA (e.g., offset against a subsidy payment to repay an unrelated defaulted loan). In both instances the government is withholding a payment to which a party is clearly entitled but for the party's default in a totally separate transaction. By contrast, in intra-contract withholding there is a connection between the contractor's right to payment (if any) and the government's basis for withholding.[211] The intra-contract case is therefore much less closely analogous to the forms of offset clearly covered by the DCA. Moreover, intra-contract withholding without the DCA procedures is consistent with ordinary commercial expectations. Dissatisfied buyers commonly withhold payment. In private transactions, at least, the law generally sanctions such withholding without the need for prior judicial approval, leaving the burden on the seller to sue for its money if it can persuade a court that it in fact performed as promised.[212]

2. Offset Procedures Under the CDA (assuming, arguendo, that the DCA does not apply)

Section 605(a) of the CDA provides that "All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."[213] A "contracting officer" is defined as "any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. . . ."[214] In general, with respect to any particular contract there will be a designated contracting officer (CO). (Often there are several with various allocations of responsibility.[215]) The CO acts as the representative of the government in the contract,[216] but also plays a quasi-judicial role with respect to contract claims, whether by the government or the contractor.[217]

A contractor who is unhappy with the decision of a CO may, at the contractor's option, appeal to an appropriate agency board of contract appeals (BCA) or sue the government in the United States Claims Court.[218] In either case, the contractor is entitled to a de novo decision.[219] The CDA gives to agency BCA's authority to take testimony under oath, provide for discovery proceedings, and subpoena witnesses and documents.[220] BCA members must be selected and appointed to serve in the same manner as administrative law judges.[221] Decisions of both BCA's and the Claims Court may be appealed to the United States Court of Appeals for the Federal Circuit.[222]

The CDA makes no mention of collection by offset, and the brief FAR provisions on offset do not spell out the relationship of offset to the CDA dispute provisions.[223] Case law, however, holds that an inter-contract offset must be based on a "claim" against the contractor, thus triggering the CDA requirement for a CO decision regarding the claim before offset can occur.[224] Offset can proceed based on the CO decision even if that decision is being challenged by the contractor in the Claims Court or agency BCA.[225] Thus, while the CDA establishes quite elaborate procedures for the ultimate resolution of contract disputes, the due process available before offset can occur is confined to that entering into the CO decision.

The CDA requires that CO decisions must be in writing, must state reasons for the decision, must inform contractors of their rights under the CDA, and need not include specific findings of fact.[226] No CO decision procedures are otherwise spelled out. The FAR requires the CO to "review" pertinent facts, "secure assistance from legal and other advisors," and "coordinate" with other appropriate government offices. (There are also some requirements concerning the form and content of the written decision.)[227] Notably absent is an explicit mention of any participation by the contractor. The FAR does seem to contemplate (though not clearly mandate) that there will usually be negotiations and an attempt at settlement between the contractor and representatives of the government before a CO decision is sought.[228] Such negotiations would presumably often provide some degree of informal notice of and opportunity to respond to, government contentions. Moreover, the FAR provision on the content of the CO's decision requires, inter alia, a "statement of the factual areas of agreement and disagreement."[229] This requirement seems to presume that the CO will become familiar with the contractor's position by some mechanism, even though the nature of the mechanism is not spelled out.

Despite the silence, or, at least, ambiguity, of the CDA and FAR, case law appears to hold that the contractor must have some opportunity to present its position before a CO can properly issue a decision on a government claim under CDA Section 6(a).[230] The cases are somewhat cryptic, but clearly lenient, with respect to the form the opportunity must take.

For example, in Chandler Mfg. and Supply, the ASBCA stated that "the contractor must have had an opportunity to express its views or state its position with respect to claims or demands the Government is pursuing. . . ."[231] At the same time, the decision quotes with apparent approval language from a pre-CDA ASBCA decision to the effect that, "The cases do not require or even suggest that the contracting officer must afford the contractor an opportunity to present evidence or to argue the merits of its position at a hearing before a dispute can be said to exist and a decision issued."[232] In Chandler, the ASBCA held that the contractor had a sufficient opportunity to present its position because in the course of negotiations with the government it "was advised of defects and deficiencies in the performance of the pumps [which the contractor had overhauled] and it had an opportunity to comment in detail on each of these statements."[233]

It should be mentioned that there is a mechanism by which contractors can sometimes have offset (and other collection efforts) postponed until they have exhausted their rights under the CDA. FAR Section 32.613(d) provides that the government may agree to defer collection pending appeal. Deferment agreements are discretionary, but the responsible government officials are directed to take into account such considerations as "avoid(ing) possible overcollection" and balancing "the need for Government security against loss and undue hardship on the contractor."[234] By some accounts, the government was historically very free in granting deferred collection agreements, but has been less so in recent years.[235] Some members of the government contracts bar apparently hope that application of the DCA would act as a substitute for, or encourage greater use of, deferment agreements.[236]

B. Effect of DCA Requirements

What would be the affect of applying the DCA administrative offset requirements to government contract offsets. As noted previously, there are four main procedural requirements imposed by 31 U.S.C. Section 3176(a):

(1) Written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanataion of [the rights of the debtor under the DCA];

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

We will begin by focusing on the effect of requirement 3, opportunity for a review within the agency, and then discuss the remaining requirements.

One possible interpretation of requirement (3) is that an additional opportunity for review in connection with an offset attempt would have to be added to the CDA procedures. However, as discussed previously, the language of the DCA would appear to permit existing procedures to be harnessed for DCA purposes, if they otherwise meet the requirements of the act.

Assuming that agencies can employ CDA procedures for DCA purposes, would the requirements for review within the agency require completion of the full range of CDA review procedures, including a decision by a BCA, before offset can occur?[237] The answer should be no. The DCA language does not specify any particular form of review, and, as argued above, probably contemplates a form of reasonably quick and informal bureaucratic review. By contrast, a BCA proceeding is a form of adjudicatory style review, and can involve fairly elaborate trial-like procedures.[238] BCA proceedings often take several years until a decision is reached.[239]

The method of complying with the DCA review requirement that would be least disruptive to existing procedures would be to treat the CO's decision on the claim as the "review within the agency." One possible objection is that the CO decision is highly un-independent, since the CO, in important respects, functions as the representative of the agency, and is required by the FAR to consult and coordinate with other agency officials.[240] However, the use of a non-independent decision maker who informally consults within the agency is consistent with a bureaucratic review procedure, and is therefore probably legitimate for DCA administrative offset purposes.

A more difficult question is whether the level of contractor participation in CO decisions is sufficient to permit such decisions to be considered an "opportunity for review" under the DCA. (The question is, of course, made more difficult by the ambiguity of the FAR and contract case law on the subject of contractor participation.) 31 U.S.C. Section 3176(a)(3) does not explicitly require debtor participation as part of a "review," but it seems highly likely that some opportunity for the debtor to present its position was contemplated, given the usual notions of "review" in our legal system. Moreover, the DCA requirements of notice and an opportunity to inspect and copy agency records are presumably for the purpose of enabling the debtor to effectively challenge government contentions as part of the "opportunity for review." Thus, the DCA pretty clearly requires some opportunities for the debtor to state its position, and present evidence and arguments on its behalf. As described previously, the FCCS requires agencies to grant at least a "paper hearing" to the debtor, and, in some cases, an informal oral hearing.[241]

To what extent do existing CDA procedures meet the DCA requirement for a pre-offset opportunity for review? The judgment of several government contracts experts interviewed for this report was that most of the time, but not all of the time, existing procedures probably give contractors a fairly good opportunity to present and defend their position prior to a CO decision on claims against them. This appears to be true for several reasons. First, as noted, the case law requires some opportunity for contractors to present their position. Second, and perhaps more important, the ordinary circumstances of contract disputes make it likely that the contractor will be told of government dissatisfaction and the basis for it, and that there will be discussions and negotiations before a CO decision on a claim materializes.

Assuming that the contractor understands that the government is planning to establish a claim, and that there will be a CO decision which could expose the contractor to offset or other collection efforts, and further assuming that there is an opportunity to present information and arguments, the informal opportunities to present the contractor's case that now commonly exist under the CDA should be considered an "opportunity for review" within the meaning of the DCA. However, because the FAR does not specifically require contractor participation in CO decisions, it is likely that in some number of cases, CO decisions on government claims are issued without procedures that amount to an opportunity for review of the government's position.

Assuming that the CDA CO decision can constitute an "opportunity for review" for DCA purposes, what effect would the other DCA requirements have on existing contract claim procedures? Contractors apparently usually get some notice of the basis for government claims before a CO decision, but the notice almost certainly does not comply with the specifics of 31 U.S.C. Section 3716(a)(1) which requires the notice to be in writing, to specify the intention of the agency to collect by offset, and to explain to the debtor the rights granted by the DCA.[242] Presumably, notice consistent with Section 3716(a)(1) could be given fairly easily, assuming that the notice of intent to collect by offset does not need to specify what particular payment is to be offset against.

Section 3716(a)(2) requires an "opportunity to inspect and copy the records of the agency related to the claim." It does not appear that contractors are regularly given such an opportunity prior to CO decisions,[243] although in the course of negotiations contractors may sometimes be given copies of or advised of the contents of, selected government records. (Records might also be obtained in some cases under the Freedom of Information Act).[244]

The requirement to produce records may be more burdensome for claims arising out of procurement contracts than for some other classes of claims. For example, the records relating to a defaulted debt might consist of as little as a packet of loan documents, together with a few pages of ledger cards or computer printouts recording payment history and collection efforts. By contrast, consider a hypothetical warranty claim for a piece of high tech military equipment. The total amount of documentation relating in some way to the contract is likely to be massive. Even if records required to be produced were confined to those specifically relating to the warranty claim, they might include numerous maintenance records and accident reports from a variety of locations, together with engineering studies, etc. Most government contract claims would probably involve less complicated records than this hypothetical, but would still involve more complicated records than a simple unpaid loan.

While record production burdens would probably be greater for procurement contract claims than for many other claims, it is not clear that they should be viewed as overly burdensome. Presumably, the government would have had to identify and pull together relevant documentation in order to establish the scope of its claim in the first place. In addition, the FAR requires the contracting officer to "review the facts pertinent to the claim," before issuing a decision.[245] Presumably this would require some assembly of relevant documents. Finally, under existing procedures the contractor will eventually have access to most relevant documentation since BCA and Claims Court procedures allow for discovery.[246]

The final DCA requirement is that the debtor be given "an opportunity to make a written agreement. . . to repay the amount of the claim." There is no precise equivalent in the CDA or FAR. However, existing contract procedures may often be at least roughly consistent with the DCA requirement. Several FAR provisions contemplate, though they do not appear to require, that there will be settlement negotiations as part of the process of collecting contract debts.[247]

Some contractor representatives have expressed the view (or at least the hope) that the DCA requirement concerning a written agreement to repay the claim could be interpreted as a directive to contracting agencies to make greater use of agreements to defer collection pending litigation of contract disputes.[248] However, it seems more likely that Congress had in mind written agreements in final settlement of a claim, as opposed to contingent agreements by a contractor to repay if and when it loses in litigation. Certainly the language of 31 U.S.C. Section 3716(a)(4) does not refer to contingent agreements to repay; and there is no legislative history, or context from other DCA provisions, suggesting that Congress had contingent deferred collection agreements in mind.

C. What is at Stake

For the ultimate resolution of a dispute over a claim, the CDA clearly gives contractors more elaborate procedural protections than does the DCA. The significance of the DCA, if any, concerns timing. DCA procedures must be completed before offset occurs, while the major CDA procedures — BCA or Claims Court proceedings — can occur after offset.

The effect of delay is mitigated to the extent that the party forced to wait for its money pending litigation can obtain interest. In general, the government can obtain interest on contract claims.[248a] In principle, a contractor should be able to obtain interest on money improperly withheld by the government; and FAR section 32.613(l) appears to provide for this.[249] There is, however, a procedural complication which may cause difficulties for some contractors. Several cases have held that under the language of the CDA, contractors can only obtain interest on claims they themselves bring against the government.[250] Under these cases, a contractor who successfully contests a claim brought by the government is entitled to the return of money improperly collected or withheld pursuant to the claim, but is not entitled to interest. The cases would appear to allow the contractor to obtain interest by following the CDA procedures for pursuing its own claim against the government for the improperly withheld money, in addition to contesting the government's claim,[251] but the law in this area could probably use some clarification.

Even assuming the contractor can ultimately obtain interest, the ability to offset prior to completion of litigation clearly gives the government an advantage for purposes of settlement negotiations. Offset before CDA procedures are completed can be a particularly serious problem for smaller contractors with potential cash flow problems. (Under the standards set forth in the FAR, these companies may be more likely to obtain deferred collection agreements, though it is not clear if this is occurring in practice.)

It appears from the discussion in the previous section that the government could comply with the DCA and still retain the timing advantages of existing offset procedures by simply modifying the CO decision process to comply with the DCA offset requirements. Moreover, it appears that the required modifications would be relatively modest. Why, then, has the government taken the position that the DCA offset provisions do not apply to procurement contracts?

In part the government position appears motivated by fears of "worst case" scenarios. Examples of such possibilities would include an interpretation of the DCA as requiring a separate offset dispute proceeding (or, worse yet, a separate proceeding with relatively formal procedures) in addition to all existing CDA proceedings, or an interpretation requiring completion of all CDA procedures, before offset can occur. Short of worst case possibilities, some government lawyers have expressed concern that efforts to draft DCA regulations in ways that did not seriously interfere with existing procedures would inevitably give rise to extensive litigation over the regulations. Finally, there is concern that even modest additions to existing procedures would add some burdens, and increase possibilities for delay and error.

D. A Suggested Approach

There are various approaches possible to meshing DCA offset procedures with CDA procedures in government contract cases. Whatever approach is adopted should be consistent with two general principles.

1. Before inter-contract offset can occur, the contractor should have notice of the government's claim and the basis for it and some opportunity to present its position, including informal presentation of arguments and evidence.

2. Measures to comply with 1 should disrupt existing use of offset and CDA procedures to the minimum extent possible.

Principle 1 is motivated in large part by a judgment that before the government takes a relatively coercive step like offset, there should be some check on the correctness of the basis for the action. Such concern is presumably the basis for the DCA offset provisions. It is likely that Congress did not focus on how the DCA procedures would apply to procurement contracts. However, even if the specifics of the DCA do not mesh well with the CDA, the broader principle of pre-offset review can appropriately be abstracted from the DCA and applied to all use of offset, including in contract cases.

This position is reenforced by the due process discussion, above, which suggests that government collection by offset probably involves a Fifth Amendment taking, requiring some degree of due process. Post - Matthews v. Eldridge law on what process is due is too unclear to confidently state that pre-offset review would necessarily be required, although at least some case law outside the contracts area requires review prior to collection by offset.[252] More generally, the existence of a Fifth Amendment interest supports pre-offset review as a matter of policy even if it is not strictly required as a matter of law.

Principle 2 is motivated by several considerations. First, the CDA is in place as a comprehensive system for dealing with contract claims, and it seems undesirable to unnecessarily duplicate or disrupt CDA procedures. In addition, the opportunity to employ offset expeditiously is valuable to the government, both to deal with risks of contractor insolvency and to create incentives for good performance by contractors and satisfactory settlement of claims.

It is likely that the two principles set forth above could be achieved either within or outside the framework of the DCA. Without attempting to draft specifics, two such approaches will be sketched.

Assuming that the DCA were to be applied to procurement contracts, the two principles could be complied with by employing the CO decision as the "review within the agency" required by the DCA, but modestly beefing up the CO decision procedure to ensure it complied with the DCA requirements. Based on the discussion above, CO decision procedures could probably be modified in this way by means of agency regulations, most likely by amending the FAR. However, if this approach were used, certain additional steps could be taken to alleviate concerns of government attorneys that the DCA might ultimately be interpreted to require more time consuming and elaborate procedures before offset could occur. One possibility would be to amend either the DCA or the FCCS to state that a decision by a CO can constitute a "review within the agency" in an offset case involving a procurement contract. Amending only the FCCS would, of course, not have the same authority as amending the statute. It could nevertheless be expected to have some influence over a court interpreting the DCA.

An alternative approach to achieving the two principles would be to amend the DCA offset provisions to provide that they do not apply to offsets where the claim and the offset money both arise out of procurement contracts covered by the DCA. This, of course, would be the most decisive way of minimizing the risk of serious disruption of CDA procedures, but would leave the question of ensuring adequate pre-offset due process.

As noted previously, it is likely that existing CO decision practices provide de facto notice and opportunity to assert the contractor's position a high percentage of the time. However, such provision should be more systematic if CO decisions are to be the basis for inter-contract offset. Probably the best approach would be to amend the FAR to make clear that before a CO decision is issued, the contractor must be given reasonable notice of the government's position and a reasonable, though informal, opportunity to present information and arguments to the CO. It should be noted that some government contract experts feel that the FAR should spell out the requirements for CO decision procedures more fully as a matter of good practice, even apart from concerns about offset.[253]

There are some possible approaches to achieving principle 2 aside from amending the FAR. One would be for Congress, in amending the DCA to exclude procurement contracts, to specify that some pre-offset notice and informal opportunity for review must be granted within the CDA framework. As a practical matter this would probably lead to amendment of the FAR to comply with the statutory requirement. Another approach would be for Congress to amend the DCA without imposing statutory procedural requirements, but specify in the legislative history that it was proceeding on the understanding that the CDA, as interpreted by relevant case law, required a pre-offset CO decision, including a meaningful opportunity by the contractor to present its position.

A satisfactory resolution of the issue of pre-offset procedures in contract cases could be achieved under either of the two general approaches outlined, and the ultimate practical result would be very similar. Of the two approaches, the second — excluding procurement contracts from the DCA and providing any needed procedural protections entirely within the CDA and FAR framework — is probably preferable. Doing so is most consistent with the existence of the CDA as a comprehensive system for handling government contract disputes. It is also analogous to the approach taken in the DCA to offsets under the Social Security Act. The DCA offset provisions do not apply to such offsets,[254] presumably in part because there already exist elaborate procedures for dealing with disputes concerning disability, welfare, and other payments under the Social Security Act.

The discussion so far has focused on inter-contract offsets (case 2 in the listing at the beginning of this section). What about the other possible scenarios for interaction of the DCA and CDA? Suggested approaches are as follows:

Case 1, intra-contract withholding. For reasons stated previously, such withholding should not be treated as offsets within the meaning of the DCA.

Case 3, offset of contract payments to pay a non-contract claim. Such cases should be covered by the DCA. Since the government's claim does not arise out of a procurement contract, the CDA would not apply to the government's initial establishment of its claim. Thus, the CDA would apparently impose no procedural preconditions on the offset. (Following offset of a contract payment, the contractor might bring its own CDA claim for nonpayment, but this would occur after the offset.)

Case 4, offset of non-contract payment to pay contract based claim. Such cases should probably be treated like inter-contract offset cases, since the relevant dispute will ordinarily deal with the claim, which will be subject to CDA procedures. Thus, the same issues of possible duplication, delay, etc., which arise in connection with inter-contract offsets arise here, and should be treated similarly.

It should finally be noted that issues of meshing different procedural schemes, analogous to those arising in connection with procurement contracts, can also arise in other areas of administration where offset is used, most notably in connection with government grants. Agency grant dispute procedures differ widely in nature and quality[255] and it was not possible to systematically explore the mesh between grant prrocedures and the CDA for purposes of this report. However, the great variation in grant dispute procedures suggests that grant offsets should remain covered by the DCA to ensure that minimal pre-offset procedural protections exist. At the same time, our discussion of the mesh between the CDA and DCA suggests that possibilities may exist in many instances for integrating or partially integrating DCA offset procedures and existing grant dispute procedures. FCCS Section 102.3(b(2)(ii) would appear to encourage such integration as well.

Recommendations

1. The framework for offset dispute resolution established by the DCA, FCCS, and OPM Pay Administration Standards, when suitably implemented, appears to make possible reasonably adequate evaluation of disputes without seriously impeding collection of general government debts. No major changes are needed.*

2. Agencies should take steps to enhance the accessibility of offset dispute procedures to debtors with limited ability to present a case in writing or otherwise cope with adjudicatory procedures. These steps may appropriately be confined to measures that are inexpensive and do not significantly interfere with efficient collection activity. Examples might include follow-up telephone calls to debtors with vague or inadequate written submissions, review of agency records to see if they support debtor allegations, and use of telephone hearings. In connection with salary offset disputes, these steps should, to the extent feasible, be taken by independent hearing officials (or persons associated with them) as well as by collection staff. Experience should be monitored to see if measures to enhance accessibility of the dispute process in fact result in more debtors asserting meritorious defenses.

3. As a matter of law, the binding effect of offset dispute decisions should ordinarily be confined to agency use of offset. In addition, the collateral estoppel effect of determinations made in offset dispute proceedings should be limited.

   However, as a matter of policy, agencies should ordinarily conform their overall collection activities to determinations with respect to the underlying debt made in offset dispute proceedings. A presumption in favor of doing this should be particularly strong where the debtor is an individual and the size of the debt is small. The presumption should be weak where the offset dispute proceeding is only one of several procedural forums in which determinations with respect to the debt are being made.

   To permit implementation of this policy recommendation agencies (and possibly the GAO) may in some cases need to take administrative steps to adopt offset dispute determinations with respect to debts as the agencies' position with respect to them.

4. The procedures applicable to the use of administrative offset to collect claims arising out of government procurement contracts should be clarified. The procedures adopted should be consistent with two principles:

   a. Contractors should be entitled to notice of proposed government claims and the basis for them, and an opportunity to present their position and the basis for it, before offset can occur. The notice and opportunity to be heard could be highly informal, so long as they were meaningful.

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* However, this study did not obtain sufficient information to permit a recommendation as to whether DCA procedures are appropriate for routine pay adjustments.

b. There should be minimum disruption or duplication of existing contract claim and collection procedures. In particular, the government should be able to proceed with offset based on the contracting officer's decision on a government claim pursuant to the Contract Disputes Act, provided that the contracting officer's decision complies with principle (a).

These two principles could be achieved in a variety of ways. The preferred approach would be to amend the Debt Collection Act provision on administrative offset to exclude government procurement contracts covered by the Contract Disputes Act, while at the same time amending the Federal Acquisition Regulation to make clear that contractors must be given informal notice and an opportunity to be heard before a contracting officer's decision on a claim can serve as the basis for offset.

Alternatively, regulations could be adopted to bring the procedures for decisions by contracting officers on government claims into conformity with the requirements of the Debt Collection Act for administrative offset procedures. If this were done, it might also be useful to amend the Federal Claims Collection Standards or the Debt Collection Act to make clear that a decision by a contracting officer under the Contract Disputes Act can serve as the pre-offset "opportunity for review" required by the Debt Collection Act.

Withholding of funds in connection with a single contract, where final payment has not yet occurred, should continue to be governed by existing law.

Footnotes

1. P.L. 37-365, October 25, 1982.

1a. S.R. 97-378.

1b. Id.

1c. DCA §13.

1d. DCA §11.

1e. DCA §2, 3.

1f. DCA §8.

1g. Interviews with collection officials at SBA, Department of Education, and HUD.

1h. DCA §5(a)(2), 10.

2. DCA §5, codified at 5 U.S.C. §5514.

3. See U.S. General Accounting Office, Principles of Federal Appropriations Law (First Edition, 1982) at 11-198, 199 (describing pre-DCA law).

4. U.S. General Accounting Office, Debt Collection, Billions Are Owed While Collection and Accounting Problems are Unresolved (May 1986) (hereinafter, GAO Debt Collection Report) at 86; interview with attorney from HUD office of general counsel.

5. Id.; interview with official of HUD Title I program.

6. Interview with official of HUD Title I program.

7. Interview with SBA collection official.

8. GAO Debt Collection Report at 107.

9. Id. at 96.

10. Interview with HUD attorney and Department of Education collection official.

11. GAO Debt Collection Report at 76.

12. Interviews with HUD attorney and Title I official.

13. Interview with SBA ALJ.

14. GAO Debt Collection Report at 48.

15. 31 U.S.C. §3701(a)(1).

16. E.g., United States v. Munsey Trust Co., 332 U.S. 234 (1947).

17. DCA §10, codified at 31 U.S.C. 3716.

18. 1 Riley, Federal Contracts, Grants & Assistance 75 (1983).

19. Interview with HHS collection official; U.S. House of Representatives, Committee on Government Operations, Failure of Federal Departments and Agencies to Collect Audit-Related Debts (House Report 97-727, August 12, 1982) at 11-12 (criticizing use of offset as standard method of collecting audit-related debts from grantees).

20. Interviews with HUD attorney and collection officials at Departments of Education, HHS, and Labor.

21. 1 Riley, supra note 18 at 77.

22. See 4 C.F.R. §102.4, Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

23. See e.g., Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chic. L. Rev. 739 (1976).

24. See, e.g., cases discussed infra at notes 123-133.

25. This categorization of procedures was inspired in part by Professor Mashaw's distinction between "administration" and "adjudication" as methods of decision making. See, e.g., J. Mashaw, Due Process in the Administrative State 224-238 (1985); J. Mashaw, Bureaucratic Justice 25-34 (1983) (parallel distinction between "bureaucratic rationality" and "moral judgment").

26. 5 U.S.C. §5514(a)(2)(B) (salary offset); 31 U.S.C. §3716(a)(2) (administrative offset).

27. See, Verkuil, supra note 23 at 752-756 (contrasting adversary and investigatory procedures), 760 (listing possible components of due process); J. Mashaw, Bureaucratic Justice 88-97 (1983) (contrasting adversary and investigatory procedures in relation to "process values").

28. Price v. SBA, U.S. SBA Office of Hearings and Appeals Docket No. DBT-86-07-28-05 (1986).

29. See the description of SBA procedures below at notes 111-120.

30. See, e.g., 1 K. Davis, Administrative Law Treatise 54 (1983); see generally, J. Mashaw, Bureaucratic Justice (1983).

31. 5 U.S.C. §5514(a)(2)(A).

32. 5 U.S.C. §5514(a)(2)(B).

33. 5 U.S.C. §5514(a)(2)(C).

34. 5 U.S.C. §5514(a)(2)(D).

35. 5 U.S.C. §5514(a)(2).

36. 31 U.S.C. §3716(a).

37. Id.

38. See, e.g., Edles, The Hearing Requirement in the 1980s, 31 Fed. Bar News & Journal 134.

39. Sniadach v. Family Finance Corp. 395 U.S. 337 (1969).

40. See Senate Report No. 97-378 at 11-12.

41. Supra note 3.

42. 5 CFR Part 550.

43. 4 CFR Parts 101-105.

44. 5 CFR §550.1104; 4 CFR §102.3(a).

45. 5 CFR §550.1104(g)(2).

46. 5 CFR §550.1104(g)(3).

47. 5 CFR §550.1104(g)(2).

48. See 49 Fed. Reg. 8889, 8891 (March 9, 1984), citing 442 U.S. 682 (1979).

49. Infra, text at note 129.

50. 5 CFR §102.3(c)(6). The FCCS also state that an agency need not provide for oral hearings on a case-by-case basis in collection systems where issues of credibility or veracity would rarely arise. 5 CFR §102.3(c)(2).

51. 5 CFR §102.3(c)(1).

52. 5 CFR §102.3(c)(3).

53. E.g., 22 C.F.R. §213.6 (Agency for International Development administrative offset regulations).

54. 34 CFR §31.4(a).

55. 34 CFR §31.4(b).

56. 34 CFR §31.4(b)(2),(3).

57. 34 CFR §31.4(d).

58. 34 CFR §31.4(e).

59. 34 CFR §31.5.

60. 34 CFR §31.6(a).

61. 34 CFR §31.6(b)(1).

62. 34 CFR §31.6(b)(2).

63. 34 CFR §31.6(c)-(f).

64. 34 CFR §31.7(b).

65. 34 CFR §31.9(a)(1).

66. Interview with Department of Education collection official.

67. 34 CFR §31.9(a)-(c); 34 CFR §31.10.

68. 34 CFR §31.9(e)(2)(i).

69. 34 CFR §31.9(e)(1)(i).

70. For a discussion of the danger of the later phase of a multi-phase review system displacing earlier phases, in the context of social security disability proceedings, see J. Mashaw, Bureaucratic Justice at 190.

71. Oral hearings may have other potential functions; for example, enhancing parties' sense of participation, or encouraging decision makers to empathize with persons affected by their decisions. Some of these effects may not require an oral evidentiary hearing, however. The case law appears to have emphasized the truth-finding value of oral evidence. See infra, text at notes 123-133.

72. See supra, text at note 50.

73. See generally, Goldberg v. Kelly 397 U.S. 254 (1970).

74. There might be occasional exceptions; for example, if there were a dispute about whether certain information was communicated to the Department.

75. 34 CFR §31.11(a)(1).

76. 34 CFR §31.11(b).

77. 34 CFR §31.11(a)(3).

78. 16 CFR Part 433; Hudak & Carter, The Erosion of the Holder in Due Course Doctrine: Historical Perspective and Development -- Part II, 9 U.C.C.L.J. 235 (1976).

79. Id.

80. 34 CFR §31.12.

80a. 34 CFR §31.12(3),(4).

80b. 34 CFR §30.20-30.31.

80c. 34 CFR §30.24.

81. 34 CFR §30.24(e).

82. Comment of Department of Education official at September 1986 meeting at ACUS.

83. 34 CFR §30.25(a),(b).

84. 34 CFR §30.25(c).

85. 34 CFR §30.26.

86. 34 CFR §30.26(c)(3).

87. Interview with HUD attorney.

88. Salary Offset Hearing Procedures (SOHP) §1.

89. SOHP §7(a).

90. SOHP §6.

91. SOHP §11.

92. SOHP §13.

93. SOHP, §15.

94. Conversation with HUD ALJ. See opinions in case nos. HUDALJ 85-20-OA; HUDALJ 85-1-OA.

95. SOHP §16.

96. SOHP §17(b).

97. SOHP §17(c),(d).

98. Conversation with HUD ALJ.

99. SOHP §18, 19.

100. 24 CFR §17.109.

101. Interview with HUD attorney.

101a. 24 CFR §17.108.

101b. 24 CFR §17.109(b).

101c. 24 CFR §17.108(a).

101d. 24 CFR §17.109.

102. 40 CFR §30.15(b),(c), 52 Fed. Reg. 267, Jan. 5, 1987.

103. 40 CFR §30.15(b)(2).

104. 40 CFR §30.15(b)(3).

105. 40 CFR §30.15(n)(1).

106. 40 CFR §30.15(n)(3).

107. 40 CFR §30.15(m)(3)(vi).

108. 13 CFR §140.4(b), 140.5(b).

109. 13 CFR §140.4(b)(2).

110. 13 CFR §140.4(b)(4)(C).

111. 13 CFR §140.4(b)(4)(D), 140.5(b)(4).

112. 13 CFR §134.2(a)(7).

113. 13 CFR §134.1(a),(c),(d).

114. 13 CFR §134.29.

115. 13 CFR §134.29(b).

116. 13 CFR §134.38.

117. 13 CFR §134.19(b).

118. 13 CFR §134.28.

119. 13 CFR §134.24.

120. 13 CFR §134.32(a)(3).

121. Otherwise, the recipient would not have a sufficiently clear interest in a payment for the payment to be a meaningful offset target.

122. See generally, Steinberg, Federal Grant Dispute Resolution, in 1 Administrative Conference of the United States Recommendations and Reports 137, 194 (1982) and sources cited therein. See Eguia v. Tompkins, 756 F.2d 1130, 1138 (1985) (offset by Texas County against final paycheck of justice of the peace); Atwater v. Roudebush, 452 F. Supp. 622, 626-627 (1976) (offset against back wages and retirement benefits of retiring federal employee); but cf. Wisdom v. Dept. of Housing and Urban Development, 713 F.2d 422, 425 (1983) (offset against retirement benefits of retiring federal employee; postdeprivation hearing adequate since relevant property was not available to employee at time of offset).

123. 424 U.S. 319 (1976).

124. 424 U.S. 319, 336-339.

125. 424 U.S. 319, 350.

126. 424 U.S. 319, 336.

127. To the extent that the need for a pre-offset hearing is the issue, it may be more accurate to say that the private interest is the use of the money.

128. 424 U.S. 319, 342.

129. 442 U.S. 682 (1979).

130. 442 U.S. 682, 684-688.

131. 442 U.S. 682, 697.

132. 442 U.S. 682, 697-698.

133. 424 U.S. 319, 339-340; 442 U.S. 682, 687-688.

134. Interview with Department of Education collection official; GAO Debt Collection Report at 76.

135. Comment of Department of Education collection official at Sept. 1986 meeting at ACUS.

136. See, e.g., U.S. v. Griffin, 707 F.2d 1477, 1478 (D.C. Cir. 1983) (allegations evoke school portrayed in Charles Dickens' Nicholas Nicolby).

137. 34 CFR §682.518, discussed at 707 F.2d 1477, 1481-1485.

138. Interviews with HUD attorney and Title I official.

139. Based on review of the written decisions.

140. 5 U.S.C. §5514(a)(1).

141. The grouping of cases by categories here was done by the consultant, not HUD.

142. Interview with HUD attorney.

142a. Dkt. Nos. HUDALJ 85-26-OA; HUDALJ 85-21-OA; HUDALJ 85-14-OA. In a fourth case, the debtor lost on those issues in dispute, but obtained some relief because the HUD representative concurred with the debtor's contention concerning calculation of interest. HUDALJ 85-21-OA.

142b. HUDALJ 85-1-OA; HUDALJ 85-20-OA.

143. Welch v. SBA, Dkt. No. DBT-86-1-7-1.

144. Hatle v. SBA, Dkt. No. DBT-86-08-15-06.

145. Price v. SBA, Dkt. No. DBT-86-07-28-05.

146. The petitioner stated that he attempted to contact an SBA loan officer during December 25-31, 1985, which strikes one as not the most propitious time period.

147. Kieser v. SBA, Dkt. No. DBT-86-1-14-2.

148. 618 F. Supp. 1528 (D.D.C. 1985), vacated per curium ____ F.2d ____ (D.C. Cir. 1986) (Civ. Action No. 84-01455).

149. 618 F. Supp. 1528, 1529-1530.

150. 618 F. Supp. 1528, 1533-1534.

151. The Department of Education has subsequently issued regulations leading the D.C. Circuit to vacate the District Court order and remand, supra note 148.

152. 618 F. Supp. 1528, 1534.

152a. See, e.g., Riley supra note 18.

153. See Steinberg supra note 122.

154. Based on interview with Department of Education collection official and LTV Education Systems v. Bennett (N.D. Tex CA 3-80-0125-R, 1986).

155. J. Mashaw, Bureaucratic Justice (1983) at 18.

156. HUDALJ 86-18-OA.

157. E.g., HUDALJ 86-05-OA; HUDALJ 86-06-OA; but cf. HUDALJ 86-17-OA (certain expenditures discounted because of failure of debtor to provide evidence were for necessities).

158. HUDALJ 85-26-OA.

159. Conversation with HUD ALJ.

160. SBA OHA Dkt. No. DBT-86-1-7-1; see also Dkt. No. DBT-86-08-15-06 (debtor submitted petition for review containing some general arguments, never followed up); Dkt. No. 86-04-04-03 (salary offset case).

161. Conversation with HUD ALJ.

162. Agencies have employed telephone prehearing conferences to at least some extent. See SBA OHA Dkt. No. DBT-85-11-25-2.

163. Supra, text at notes 134, 138.

164. Interviews with collection officials at HUD, SBA, Department of Education, all with responsibilities for mass consumer lending or credit guarantee programs.

165. A collection official at SBA indicated that in collecting business loans designed to promote regional economic development, efforts would be made to avoid driving companies out of business. An HHS collection official noted that officials of grant programs often failed to be aggressive in the use of offset against low budget community organizations and Indian tribes. A Department of Labor collection official noted that the black lung program was often less than enthusiastic about aggressively collecting mistaken payments made to impoverished, disabled miners. Cf. FCCS §102.3(a)(2) (". . . Agencies may also consider whether [administrative] offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. . . ."). Compare SBA, Consumer Collections -- DLH Loan Servicing (Standard Operating Procedure Section 50 No. 52, Sept. 10, 1985) at 7 ("Personnel charged with servicing disaster home loans should, throughout their activities, remember the circumstances under which these loans were made and pursue a course of action providing the maximum assistance to the disaster victims within the scope of existing disaster authority consistent with applicable laws, regulations, and procedures.") with Id. at 33 (" Attitude Adjustment. Before a telephone collector begins calling for the day, he should remind himself that his job is to collect money loaned to disaster victims at low interest rates and liberal terms. The taxpayers of this country expect the money to be repaid . . . we must psyche ourselves up so that we convey to the delinquent borrower that same expectation.").

166. Supra note 165.

167. Collection officials might develop expertise in identifying "deadbeats," but any such capacity is likely to raise issues of bias as well.

168. See supra, text at notes 31-48.

169. For evidence that adjudicatory style procedures enhance legitimacy, see Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chic. L. Rev. 739, 752-756 (1976).

170. SBA, Consumer Collections -- DLH Loan Servicing (Standard Operating Procedure Section 50 No. 52, Sept. 10, 1985) at 32-34; Department of Housing and Urban Development, Title I Collection Procedures (Handbook 4740.2, July 1983) at 2-7. See also id. at 3-13 (handling of disputed balances), 3-17 (reference to FTC anti-holder in due course rule as providing debtor with defense to payment); 3-18 (handling of forgery allegations).

171. As is to be expected, discussions of telephone contacts with debtors in agency collection manuals primarily focus on overcoming debtor objections and persuading debtors to pay. See sources cited supra at note 170.

172. Supra, text at notes 54-80a.

173. See, e.g., the discussion of the submissions required from petitioning debtors, supra, text at notes 55, 56.

173a. Thus, the qualified endorsement of bureaucratic review procedures in the text is made specifically with respect to pre-offset proceedings. Where a proceeding will determine whether a debt is owed at all, a different balance of interests may exist and bureaucratic review procedures may be less satisfactory.

174. See, e.g., Steinberg, supra note 122; G. Coburn, The Contract Disputes Act of 1978 (Practicing Law Institute 1982). Cf. Spectrum Leasing Corp. v. US, 764 F.2d 891 (1985) (discussing jurisdictional issues raised by attempt of contractor to assert DCA offset rights in contract dispute). Cf. FCCS §102.3(b)(2)(ii) which provides, "In cases where the procedural requirements specified [for administrative offset disputes] . . . have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, the agency is not required to duplicate those requirements before taking administrative offset."

175. This problem would be mitigated but not necessarily eliminated by the FCCS provision quoted supra note 174.

176. No. B-211626, letter dated December 19, 1984.

177. The Comptroller General gave as a third reason for the decision the fact that Tabor's debt was established prior to the offset by a decision of the Comptroller General issued pursuant to the Comptroller General's statutory authority. Id. at 7.

178. Id. at 6.

179. Id. at 5-6.

180. See generally, 4 K. Davis, Administrative Law Treatise 49, 51-55 (2nd ed. 1983); Restatement of Judgments 2d §83; Perschbacher, Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings, 35 U. Fla. L. Rev. 422 (1983).

181. See Restatement 2d of Judgments §83(2).

182. Perschbacher, supra note 180, at 455-458 and sources cited therein.

183. Id.

184. See generally, supra note 180.

185. 5 U.S.C. §5514(a)(2) (salary offset); 3 U.S.C. §3716(a) (administrative offset).

186. See supra note 122. Cf. Restatement 2d of Judgments §83(4)(b) (No preclusive effect if incompatible with "legislative policy that . . . The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.").

187. Restatement of 2d Judgments §83 comment h.

188. The statutory provision speaks in terms of collection "in monthly installments," and also provides, "If the individual retires or resigns, or if his employment or period of active duty otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned." 5 U.S.C. §5514. This language clearly contemplates a continuing stream of salary deductions.

189. See generally A. Steinberg, supra note _____ at §53.03[3][c] (Grant appeals involving cost issues typically arise out of audits).

190. See sources cited, supra note 180.

191. Cf. Restatement 2d of Judgments §83. Illustration 13 (no preclusive effect of decision regarding disability in hypothetical case where initial decision is in expedited proceeding regarding $1000 insurance claim while subsequent proceeding concerns $25,000 pension).

192. GAO, supra note 3 at 11-183.

193. 31 U.S.C. §3711.

194. FCCS §104.3(d) provides that, "Collection action should be terminated immediately on a claim whenever it is determined that the claim is legally without merit."

195. 41 U.S.C. §§601-613.

196. 41 C.F.R. §1 et. seq.

197. E.g.,

198. See, e.g., R. Peacock, The Contract Disputes Act, Five Year Annotation (American Bar Association 1984).

199. See J. Cibinic & R. Nash, Administration of Government Contracts, 862-863 (2d ed. 1986) statutes and regulations "not well coordinated").

200. E.g., Avco Corp. v. U.S., 10 Cl. Ct. 665 (1986); Fairchild Republic Co. v. U.S., Appeal No. 86-1326, Brief for Appellee at 22-34 (hereinafter, Fairchild Brief) (Fed. Cir. Oct. 10, 1986).

201. Interview with Department of Justice official.

202. Supra, text at note 154.

203. 31 U.S.C. §3716(c)(2) provides that, "This section does not apply . . . when a statute explicitly provides for . . . using administrative offset to collect the claim or type of claim involved." See also 31 U.S.C. §3701(d) (excluding Social Security Act and tax claims from coverage of §3716).

204. Fairchild Brief, supra note 200 at 22-34.

205. DMJM/Norman Engineering Co., ASBCA No. 28,154, 84-1 BCA ¶17,226; IBM Corp., ASBCA Nos. 28,821, 29,106, 84-3 BCA ¶17,689.

206. 84-1 BCA ¶17,226 at 85,774-85,776.

207. E.g., A.J. Fowler Corp., ASBCA No. 28,965, 86-2 BCA ¶18,970; Fairchild Republic Co., 85-2 BCA ¶18,047 (1985), aff'd on reconsideration, 86-1 BCA ¶18,608 (1985).

208. Avco v. U.S. 10 Cl. Ct. 665 (1986).

209. 10 Cl. Ct. 665, 667.

210. See, e.g., Avco Corp. v. U.S., Plaintiff Avco's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Cl. Ct. (April 30, 1986); Conversation with academic expert.

211. The directness of the connection varies. Often, there will be multiple payments scheduled under a single contract, and the government may withhold payment for properly performed work because it has discovered a deficiency in work already paid for. Even in such a case, however, the defective work and the withheld payment both fall within the framework of the same contract.

212. See, e.g., UCC §2-717 (buyers right to deduct damages from price of goods sold).

213. 41 U.S.C. §605(a).

214. 41 U.S.C. §601(3).

215. Interview with government contracts attorney. See, e.g., DoD supplement to FAR.

216. See FAR §1.602-2 ("Contracting officers are responsible for . . . ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.").

217. See J. Cibinic & R. Nash, supra note 199 at 944 (citing case law that CO has obligation to act as an "impartial, unbiased judge" in dealing with disputes).

218. 41 U.S.C. §606, 609.

219 41 U.S.C. §605(a).

220. 41 U.S.C. §610.

221. 41 U.S.C. §607(b)(1).

222. 41 U.S.C. §§607(g).

223. FAR §§32.610, 32.611.

224. See J. Cibinic & R. Nash, supra note 199 at 867.

225. 2 Federal Contract Management, A Manual for the Contract Professional (N. Steeger ed. 1984) at ¶13.07[1] [b].

226. 41 U.S.C. §605(a).

227. FAR §33.211(a).

228. See, e.g., FAR §33.211(a).

229. FAR §33.211(a)(4)(iii).

230. E.g., Space Age Engineering, Inc., ASBCA No. 26028, 82-1 BCA ¶15,766. It should be noted that in its opinion the ASBCA relied heavily, though not exclusively, on a 1st Cir. slip option in Woods Hole Oceanographic Institution vs. U.S., which was subsequently vacated on other grounds. In its published opinion in Woods Hole, the 1st Cir. expressly declined to rule one way or another on the issue of whether under the CDA a CO can issue a decision on a government claim without giving the contractor notice and an opportunity to be heard, which the court described as an "open question." 677 F.2d 149, 156 n. 8 (1st Cir. 1981).

231. ASBCA Nos. 27030, 27031, 82-2 BCA ¶15, 997 at 79,313.

232. Id.

233. Id.

234. FAR §32.613.

235. Interview with partner at major government contracts law firm. Appendix E §612 of the Defense Acquisition Regulation, a predecessor of the FAR, specified that deferred payment agreements should be freely granted. This language is not in the current FAR.

236. Interview with partner at major government contracts law firm.

237. See, J. Cibinic & R. Nash, supra note 199 at 864, which may suggest such an interpretation of the DCA.

238. See generally, Office of Federal Procurement Policy, Proposed Uniform Rules for Boards of Contract Appeals, 44 Fed. Reg. 5219 (Jan. 25, 1979).

239. See G. Coburn, The Contract Disputes Act of 1978, 56 (PLI 1982) ("Ordinarily, a fairly large case may be litigated in an agency board of contract appeals in less than two years . . . ."). According to a government contracts lawyer who was interviewed, cases now usually take over two years. The CDA does provide for a small claims ($10,000 or less) procedure with a time limit of 120 days possible;" and an accelerated procedure (for claims of $50,000 or less) with a time limit of 180 days. Both of these procedures are available at the sole election of the contractor. 41 U.S.C. §§607(b), 608.

240. FAR §§1.602-2, 33.211(a)(1).

241. Supra, text at note 52.

242. See, e.g., DMJM/Norman Engineering, ASBCA No. 28,154, 84-1 BCA ¶17,226 at 85,777-778; IBM Corp., ASBCA Nos. 28,821, 29,106, 84-3 BCA ¶17,689 at 88,207 (description of facts of cases with respect to DCA notice requirements).

243. Id.

244. See, J. Zengerle & J. McHale, Contracting With the Federal Government: Awards, Protests, and Disputes, 5-10 (Matthew Bender Business Law Monographs No. 16, 1985) (recommends use of FOIA as adjunct to or substitute for other forms of discovery in contract disputes). A private government contracts attorney who was interviewed expressed the view that FOIA is of limited value in contract disputes, in part because of use of FOIA exemptions.

245. FAR §32.211(a)(1).

246. J. Zengerle & J. McHale, supra note 244 at 5-9, 5-13.

247. FAR §32.608.

248. Interview with partner in major government contracts law firm.

248a. J. Cibinic & R. Nash, supra note 199 at 868-871.

249. See J. Cibinic & R. Nash, supra note 199 at 856.

250. E.g., Ruhnau-Evans-Ruhnau Associates v. U.S. 3 Cl.Ct. 217 (1983). See J. Cibinic & R. Nash, supra note 199 at 855.

251. See id.

252. See supra, note 122.

253. Interview with academic expert.

254. 31 U.S.C. §3701(d).

255. See, generally, A. Steinberg, Federal Grant Dispute & Resolution. A report for the Administrative Conference of the United States (1983).

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-10

OSHA REGULATION: REGULATORY ALTERNATIVES AND LEGISLATIVE REFORM*

by

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Part One: Internal Reform

The Occupational Safety and Health Administration (OSHA) operates under a double handicap. While it has regulatory responsibilities at least as difficult as any other health and safety agency, it must contend with Congressionally imposed substantive, procedural, and organizational constraints that have the cumulative effect of throttling even vigorous attempts at regulation. Agency progress has been slowed by other factors, including the unwillingness of some agency administrators to make difficult decisions. But until Congress recognizes that there may be serious problems with the Act's approach to rulemaking and advisory committees, OSHA will find it difficult to comply with its mandate to ensure that American workplaces are safe and healthy.

Perhaps the strongest evidence of the debilitating constraints upon OSHA is the tiny number of dangerous chemicals for which the agency has written thorough health standards. A study in progress by the Congressional Office of Technology Assessment has found that no worker protection standards exist for more than one-half of the 110 chemicals used in workplaces that the National Toxicology Program regards as confirmed or suspected carcinogens.[1] The American Conference of Governmental Industrial Hygenists (ACGIH) has recommended exposure limitations for 300 chemicals for which OSHA either has no exposure limitations regulations (200 of the chemicals) or has regulations that are less strict than the ACGIH recommendations (100 of the chemicals). The National Institute for Occupational Safety and Health (NIOSH) has recommended to OSHA that it should change existing exposure regulations or promulgate new ones for over a hundred chemicals.[2] Moreover, there are tens of thousands of chemicals used in the workplace (estimates range from 17,000 to 70,000) and at least 1,000 new chemicals are introduced into workplaces each year.[3] Although many, or even most, of these chemicals may not be dangerous, if even a small proportion require regulation, OSHA has a tremendous job on its hands.

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[1] Majority of Substances on NTP Lists Not Regulated By OSHA, Analysis Finds, OCCUPATIONAL SAFETY & HEALTH REP. (July 15, 1987). OTC found that NTP's annual list of carcinogens contains 110 substances that are likely to be found in workplaces. Only 52 are regulated by OSHA, and 35 of them are regulated under 15 year-old exposure limits that are generally regarded based on new scientific knowledge as inadequate to protect workers. Id.; see infra notes 190-95 & accompanying text (many of OSHA's older health standards are inadequate to protect workers). The National Toxicology Program (NTP), which is located in the Department of Health and Human Services, tests chemicals for health and safety agencies like OSHA and EPA. See infra note 356 & accompanying text (description of functions of NTP.)

At OSHA's traditional pace of regulation, it will not be able to complete even a significant portion of what it must do. During its entire sixteen year history, OSHA has completed only eighteen new health standards covering only twenty-three substances.[4] Adopting some health and safety standards will always be time consuming because of their scientific and political complexity. But if OSHA proceeds at its traditional pace, the Occupational Safety and Health Act will never come close to achieving its promise.

OSHA is not powerless to improve its performance. In fact, it has tried alternative methods of regulation that would increase its regulatory productivity. Neverthless, a significant commitment to pursuing such alternative methods is necessary. Part One (Sections I-VI) of this report describes some of these methods and recommends how OSHA can expand their use. It concludes, however, that all of the approaches to regulation available to OSHA under its existing statutory authority have important limitations, and, as a result, legislative reform may be required. Part Two (Sections VIII - X) of this report describes potential legislative reforms and recommends which would be most useful in increasing OSHA's potential for effective regulation.

I. Contending Approaches to Regulation

Like many health and environmental agencies, OSHA can choose from among at least three regulatory approaches to complex scientific rulemaking. First, it can use a "case-by-case" approach that regulates only one hazard at a time or a "generic" approach that combines aspects of more than one hazard into a single proceeding. Second, it can adopt an "adversarial-orientation" in which it chooses the "best" option indicated after a hearing or a "consensus-orientation" in which its decision that represents a compromise among the views of the interested parties. Finally, it can choose from among "command" solutions that protect persons by ordering employers to abate a hazard, "performance" solutions that give employers a degree of flexibility in the pursuit of overall health and safety goals, and "information-oriented" solutions that allow workers to protect themselves after being informed about the dangers they face.

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[2] See infra notes 193-94 & accompanying text (ACGIH recommendations are stricter than OSHA regulations); Schroeder & Shapiro, Responses To Occupational Disease: The Role of Markets, Regulation, and Information, 72 GEO. L.J. 1231, 1257 (1984) (OSHA has not acted on over one-hundred NIOSH recommendations for stricter regualtion) (cited hereinafter as Responses To Occupational Disease).

[3] Responses To Occupational Disease, supra note 2, at 1232 n.4.

[4] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 363 (1985) (cited hereinafter as PREVENTING INJURY); Responses To Occupational Disease, supra note 2, at 1257.

OSHA in the past has emphasized the case-by-case approach, an adversarial-orientation, and command solutions. Critics contend that these choices have slowed the regulatory process and that a generic approach, a consensus-orientation, and information solutions would lead to more expeditious and efficient rulemaking. Section I presents a broad overview of the nature of alternative approaches to regulation and the advantages and disadvantages of each. Sections II-VI will examine specific proposals for internal reform, and Section VII will discuss a method by which these approaches can be implemented.

A. **Generic vs. Case-by-Case**

Agencies can resolve reoccurring or repetitive problems by promulgating a generic rule that specifies how the agency will resolve the problem each time it comes up.[5] OSHA's cancer policy is of this type. It was promulgated because the "existing case-by-case approach, with its constant re-examination of already resolved scientific and policy issues, does not permit regulation of such substances in a timely and efficient manner."[6] Agencies can also regulate more than one subject or problem in the same rulemaking proceeding. Most of OSHA's generic regulations have been for this second purpose. In the early 1970's, OSHA regulated fourteen carcinogens with similar properties in a single proceeding. OSHA has also promulgated regulations for multiple problems in single industries such as telecommunications, commercial diving, and marine terminals.[7] Finally, OSHA has regulated common problems that occur in many industries by standards which concern fire protection, noise exposure and hearing conservation, employee access to medical and exposure records, and information concerning workplace hazards.[8]

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[5] The Administrative Conference of the United States has endorsed the use of generic regulations in the context of resolving reoccurring problems. See Procedures for Resolution of Environmental Issues in Licensing Proceedings (Recommendation 73-6), 1 C.F.R. § 305.73-6 (1986) (licensing agencies should use "generic proceedings" to resolve environmental issue "common to more than one application and appropriate for across-the-board treatment."); Reduction of Delay in Ratemaking Cases (Recommendation No. 78-1), 1 C.F.R. § 305.78-1 (1986) (ratemaking agencies should use "rulemaking for generic issues" that "may arise repetitively and that may be appropriate for generalized determination . . . .").

[6] Final Rule, Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5002 (1980) codified at 29 C.F.R. §§1990.101 - .152 (1982) (as amended).

Generic rulemaking has several broad advantages. It can sharply reduce administrative costs by allowing the agency to dispose of issues in a single hearing that would otherwise have to be decided repeatedly in individual proceedings. Similarly, it can reduce overall information costs, because the agency may not have to acquire detailed information about each regulatee. Finally, because of the reduced overall costs, generic proceedings allow broader participation by small firms and public interest groups that might lack sufficient resources to participate on a case-by-case basis.

On the other hand, generic regulation can increase compliance costs, because it tends to gloss over differences between regulated firms. A "variance" procedure can reduce the possibility of inefficient and inequitable generic regulations, but that procedure itself bears heavy administrative costs that might discourage small firms from taking advantage of them. Moreover, although the generic approach reduces overall information requirements, it concentrates the agency's informational needs in the single proceeding. Thus, the agency often finds itself dropping its day-to-day activities and concentrating a large portion of its resources on the generic proceeding. Finally, since generic proceedings invariably involve high stakes, they are usually much more controversial. For the same reason, courts are probably inclined to review generic rulemakings more carefully.

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[7] Standard for Carcinogens, 39 Fed. Reg. 3756 (1974); See PREVENTING INJURY, supra note 4, at 364 (citation of all of OSHA's safety standards).

[8] See id. (fire protection standard); 46 Fed. Reg. 4078 (1981), codified at 29 C.F.R. §1910.95 (1983) (noise exposure and hearing conservation standard); 45 Fed. Reg. 35212 (1980), codified at 29 C.F.R. §1910.20(b) - (e) (1983) (employee access to medical and exposure records standard); 48 Fed. Reg. 53,280 (1983), codified at 29 C.F.R. §1910.1200 (1983) (hazard communication standard).

Despite the disadvantages, most observers within and outside the agency agree that OSHA should make greater use of generic regulations, arguing that OSHA can not keep pace with its many regulatory responsibilities by regulating only one chemical or hazard at a time.[9] Most of OSHA's efforts have been on a case-by-case basis. Only four of the agency's twenty-six safety standards and only five of the agency's eighteen health standards are generic.[10]

B. Adversarial-Orientation vs. Consensus-Orientation

An adversarial-orientation requires a process in which an agency proposes what it perceives to be the "best" regulation, it receives data and arguments from interested parties, and then it determines whether the proposed rule is justified by the evidence.[11] Critics contend this process is ill-suited for making regulatory decisions that are essentially legislative in nature, which require political compromises, and that have no

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[9] See, e.g., Interview with Frank Frodyma, Director, Directorate of Policy, OSHA, in Washington, D.C. (Sept. 26, 1986) (OSHA should consider additional generic rules); Interview with David Vladeck, Public Citizen, in Washington, D.C. (Sept. 26, 1986) (OSHA's "only possibility" of speeding decisionmaking is use of generic rules); Interview with Scott Railton, Reed, Smith, Shaw & McCleary, in Washington, D.C. (Oct. 30, 1986) (If history of OSHA indicates anything, it "shows that substance-by-substance regulation will not work."); see EXECUTIVE OFFICE OF PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, REGULATORY PROGRAM OF UNITED STATES (Apr. 1, 1986-Mar. 31, 1987) 223 (OSHA will explore possibilities for generic standards). A former OSHA Administrator argues that "[no] federal agency -- be it OSHA, EPA, NIOSH, or any other -- is going to be able to go through a regulatory process on a substance by substance approach and be able to keep pace with the new data that keeps coming out. We're looking at 3,000 new chemicals a year that go into the workplace." HOUSE COMM. ON SCIENCE & TECHNOLOGY, NEUROTOXINS AT HOME AND THE WORKPLACE, H.R. Doc. 99-827, 99th Cong., 2d Sess. 33 (1986) (Statement of Pat Tyson, former Director, Bureau of Health Standards) (emphasis in original).

[10] See PREVENTING INJURY, supra note 4, at 363-64; Responses to Occupational Disease, supra note 2, at 1305-09.

[11] See Boyer, Alternatives To Administrative Trial-Type Hearings For Resolving Complex Scientific, Economic and Social Issues, 71 MICH. L. REV. 111, 122-133 (1972) (attributes of advocacy-hearing process).

"ideal" solution.[12] Moreover, according to Professor Mendeloff, OSHA's adversarial-orientation "slows the pace of standard setting," because OSHA proposes the "strictest" regulation it deems advisable, instead of one that attempts to compromise the views of labor, management and other interested parties. Since OSHA must expect "strict" regulations to be attacked in court, it expends substantial resources in preparing to defend them.[13] This effort is time-consuming because the evidence is "rarely clear-cut," because limited agency resources make it "difficult to carry on many standard-setting activities at the same time," and because strict regulations engender more political controversy.[14] Some contend that OSHA has refused to compromise even when it may have avoided a law suit.[15]

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[12] See, e.g., Oversight on the Administration of the Occupational Health & Safety Act, 1981: Hearings Before Subcomm. on Investigations & Oversight and the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources, 97th Cong., 1st Sess. 129 (Statement of Robert Thompson U.S. Chamber of Commerce) [cited hereinafter as 1981 Oversight Hearings]; Interview with Steven Bokat, United States Chamber of Commerce, in Washington, D.C. (Sept. 9, 1986) (OSHA ends up worrying about trivial matters because administrators are unwilling to compromise); Interview with Scott Railton, supra note 9 (OSHA seeks "too much regulation" by overrelying on disputable scientific data); see generally Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1670 (1975) (agency decisions are a replacement for legislative decisionmaking); see also Jaffe, The Illusion of the Ideal Administrator, 86 HARV. L. REV. 1183, 1184, 1188 (1973) (criticizing adjudication model on assumption that nonpolitical resolution of issues is possible).

[13] Mendeloff, Regulatory Reform and OSHA, 5 J. POLICY ANALYSIS & MANAGEMENT 440, 442-43 (1986) (cited hereinafter as Regulatory Reform & OSHA); see also Mendeloff, Does Overregulation Cause Underregulation? The Case of Toxic Substances, REGULATION, Sept./Oct., 1981, at 47 (cited hereinafter as Does Overregulation Cause Underregulation?).

Others defend the agency's efforts to implement "strict" standards. They argue that OSHA's statutory mandate requires it to seek the most protection feasible for workers,[16] that it is inappropriate for a health and safety agency to make trade-offs concerning dangers to human life,[17] that a consensus approach ultimately devolves to industry self-regulation with little or no government supervision,[18] and that a consensus approach would therefore engender the opposition of labor unions, who often regard current regulations as too weak.[19] Even though the consensus approach is widely used in other countries, it may not be very adaptable to an American system of administration, in which advocacy and conflict are dominant features or characteristics.[20]

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[14] Id.; see also T. McGARITY & S. SHAPIRO, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON OSHA RULEMAKING PROCEDURES at Part IA4 (February 19, 1987) (cited hereinafter as REPORT ON RULEMAKING PROCEDURES) (political controversies slow the regulatory process); id. at 22 (agencies slowed by need to prepare record that will survive judicial review).

[15] See, e.g., Interview with Barry White, Director, Directorate of Safety Standards Programs, in Washington, D.C. (September 26, 1986) (OSHA wastes resources trying to lower exposure standards beyond point necessary to protect workers effectively).

[16] See 29 U.S.C. at § 655(b)(5).

[17] See Interview with Barry White, supra note 15 (Assistant Secretary of OSHA shies away from a consensus approach because of antagonistic views of health professionals in the agency); S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL HEALTH AND SAFETY POLICY 82 (1981) (OSHA influenced by "pro-protective values" which arise "from the ideology of the safety and health officials who [guide] the agency.").

[18] See C. NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA 181-82 (1986) (emphasis on cooperation results in subordinating public authority to existing private programs).

[19] See Interview with Barry White, supra note 15 (Assistant Secretary of OSHA inhibited from a consensus approach because of antagonistic views of labor unions).

Critics counter that because of the agency's slow pace, many hazards are not regulated or are regulated inadequately.[21] They argue OSHA could better protect workers by proposing less stringent regulations that could be adopted more rapidly, by mediating disputes and implementing the positions of affected parties, and by placing greater reliance on advisory committees to indicate consensus-oriented positions.[22] They further argue that if OSHA adopted a more cooperative attitude, industry would share technical knowledge and experience which OSHA lacks and which it could use to regulate more effectively.[23] Union representatives rejoin that some companies will fight less stringent standards just as fiercely, because the issue (control over the workplace) is one of principle. In addition, they question whether adopting a standard that the regulated firms can "live with" provides much practical protection to workers.[24]

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[20] G. WILSON, THE POLITICS OF SAFETY AND HEALTH: OCCUPATIONAL SAFETY & HEALTH IN THE UNITED STATES & BRITAIN 151, 152 (1986); R. BRICKMAN, S. JASANOFF & R. ILGEN, CONTROLLING CHEMICALS: THE POLITICS OF REGULATION IN EUROPE AND THE UNITED STATES 314 (1985).

[21] See, e.g., Regulatory Reform & OSHA, supra note 13, at 441; see generally REPORT ON RULEMAKING PROCEDURES, supra note 14, at 11-12 (many chemicals are not regulated or regulated inadequately by OSHA).

[22] See, e.g., Regulatory Reform & OSHA, supra note 13, at 441; Does Overregulation Cause Underregulation?, supra note 13, at 51; Levin, Politics and Polarity: The Limits of OSHA Reform REGULATION, Nov./Dec. 1979, at 38 (OSHA should reduce the adversarial nature of standard setting); see generally Harter, Dispute Resolution and Administrative Law: The History, Needs, and Future of A Complex Relationship, 29 VILL. L. REV. 1393 (1984); Harter, Negotiating Regulations: A Case of Malaise, 71 GEO. L.J. 1 (1982) (cited hereinafter as Negotiating Regulations).

[23] See Interview with Bob Gombar, Venable, Baetjer, Howard & Civiletti, in Washington, D.C. (Oct. 30, 1986) (In a consensus approach industry would share information that agency currently lacks).

[24] See Telephone interview with Ms. Margaret Seminario, Assistant Director, Department of Occupational Safety, Health, and Social Security, AFL-CIO (Nov. 4, 1986).

C. Command vs. Performance and Information Standards

OSHA relies on a mixture of command, performance and information standards. In promulgating safety standards, OSHA usually commands employers to implement specific technologies.[25] While some aspects of OSHA health standards are also specific commands, the critical aspect of such standards is the "permissible exposure level (PEL)," which is a performance standard that gives the company freedom to install such controls as it deems necessary to achieve the ambient level of exposure to the regulated chemical or substance. In addition, OSHA has promulgated two regulations that adopt information solutions to workplace health problems. Employees have been given access to their medical and exposure records[26] and employers are required to furnish employees with information concerning the hazards to which they are exposed.[27]

Specific regulatory commands are often easier to articulate and enforce administratively. In addition, they give the regulated industry clear signals as to what constitutes acceptable and unacceptable conduct. While no one proposes that OSHA drop command solutions entirely, reformers contend that the "job of identifying and abating occupational hazards is beyond the capabilities of a single federal agency and if OSHA is to be even modestly successful in controlling hazards, it cannot go it alone."[28] Specific standards require the agency to know a great deal about the regulated industry. Much of the information needed for such standards necessarily originates in the regulated industry and must therefore be independently validated. In addition, commands can be intrusive and inefficient, requiring firms to install expensive control technologies, when cheaper alternatives may offer the same degree of protection. Finally, the command approach kills incentives to develop more effective and less expensive control technologies.

Performance standards, conversely, give firms flexibility to protect workers through innovative and less expensive approaches to regulation. Similarly, information-oriented solutions may reduce the overall need for government intervention into the employer-employee relationship. Some observers believe that if workers are provided more information, they can better negotiate wage premiums for dangerous work, can better bargain for plant safety, can better engage in self-protection, and can better participate in relevant legislative and administrative procedures.[29] Other observers believe that although workers can benefit from additional information, they are unable to obtain significant improvements in their working conditions without effective government regulation to assist them.[30]

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[25] PREVENTING INJURY, _supra_ note 4, at 363-64; _Responses To Occupational Disease_, _supra_ note 2, at 1305-09.

[26] _See_ _supra_, note 8, and accompanying text; _see generally_ _Responses To Occupational Disease_, _supra_ note 2, at 1265 (description of regulations).

[27] _See_ _supra_, note 8 and accompanying text; _Responses To Occupational Disease_, _supra_ note 2, at 1265 (description of regulations).

[28] _See_, _e.g._, S. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH 121 (1981).

D. The Potential for Reform

Alternative approaches to regulation yield different results concerning how many workers can be protected, how many chemicals can be regulated, the degree of protection given to each worker, and the degree of political controversy that will be generated. The following chart is a rough representation of the consequence of adopting different approaches.

Effects of Alternative Methods of Regulation

	advers. c/b/c command	advers. generic command	cons. generic command	cons. generic inform./perf.
number of workers	lower	higher	higher	higher
number of chemicals	lower	higher	higher	higher
degree of protection	higher	higher	lower	lower
degree of controversy	higher	higher	lower	lower

The first vertical column represents OSHA's current reliance on an adversarial-orientation, case-by-case approach, and command solutions. If OSHA substituted generic regulations, it could cover more workers and more chemicals. The degree of controversy, however, would remain high and the process would still be fairly slow. If OSHA could achieve generic regulations with a consensus-orientation, it could speed the process because there could be a lower degree of controversy. Regulations, however, probably would offer less protection to individual workers. Finally, the same result would occur if OSHA substituted generic regulations, a consensus-orientation, and information solutions.

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[29] See Viscusi, Reforming OSHA Regulation of Workplace Risks, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 248, 251 (L. Weiss & M. Klass eds. 1986) (cited hereinafter as Reforming OSHA); Responses to Occupational Disease, supra note 2 , at 1295-97.

[30] See infra notes 83-87 and accompanying text (discussion of efficacy of information-oriented solutions).

These results suggest that OSHA could be more productive if it substituted generic regulations for a case-by-case approach whenever possible. The other solutions require a trade-off between the degree of protection offered to individual workers and the speed with which decisions can be made. This solutions therefore require OSHA to assess which set of choices is preferable: should it seek greater protection, with more controversy, or less protection, with less controversy? The next sections of this report evaluate whether OSHA can productively change its current orientation by substituting generic, consensus, and information or performance approaches.

II. Generic Regulations

Three broad categories of generic regulations that OSHA might consider include industry wide, multiple-chemical, and work practice standards.

A. Industry-Wide Standards

An industry-wide generic standard is one by which OSHA regulates the significant safety or health problems in an entire industry.[31] The agency has used, or proposed, this method of regulation for both safety[32] and health[33] standards. Reformers claim it should be used more often and recommend industries such as rubber production and chemical manufacturing as good candidates.[34]

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[31] *See* notes 7-8 *supra* and accompanying text.

[32] The agency has promulgated rules for commercial diving operations, marine terminals, and telecommunications. *See* note 7 *supra* and accompanying text. It is considering rules for such industries as grain storage facilities, gas well drilling and servicing, and logging. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT (April 1, 1986 - March 31, 1987), at 266-68, 272-74, 295-96 (cited hereinafter as REGULATORY PROGRAM).

[33] For example, OSHA is considering a standard for occupational exposures to toxic substances in laboratories. REGULATORY PROGRAMS, *supra* note 32, at 291-92.

Industry-wide standards have several advantages. First, OSHA could focus its attention on the most dangerous industries and on the most significant risks to employees in those industries.[35] Second, feasibility analysis could be simplified if some of the same cost information is relevant to each exposure limitation or other protection under consideration.[36] Third, synergistic abatement effects could make it less expensive to implement several exposure limits at one time, rather than incrementally.[37] Fourth, consensus building could be facilitated if OSHA, the industry, and other interested parties jointly devise a standard.[38] Fifth, OSHA could regulate those industries where there is little opposition to regulation, while it attempts to work out problems in other industries where there is more opposition. This allows OSHA to provide protection for some employees while it deliberates about the more troublesome industries.[39]

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[34] See, e.g., Interview with David Vladeck, supra note 9; Telephone interview with Sy Holtzman, Deputy Staff Director, Subcomm. on Health of the House Comm. on Education & Labor (Oct. 21, 1986).

[35] See REPORT ON RULEMAKING PROCEDURES, supra note 14 (OSHA should consider magnitude of risks and number of employees affected in setting priorities).

[36] See id. at Part IA1 (feasibility analysis slows rulemaking because it is time-consuming); Interview with Dan Jacoby, Solicitors Office, Department of Labor, in Washington, D.C. (Sept. 26, 1986).

[37] Interview with Karl Kronebusch, Office of Technology Assessment, in Washington, D.C. (Oct. 31, 1986).

[38] Telephone interview with Sy Holtzman, supra note 34; see Part IV infra (OSHA should consider regulatory negotiation before engaging in rulemaking); Telephone Interview with Mr. Charles Gordon, Office of the Solicitor, Department of Labor (Oct. 23, 1986). For example, OSHA successfully adopted a generic standard for laboratories, in part because laboratories cooperated in writing it and because unions did not adopt an adversarial posture concerning the standard. Id.

This idea also has several disadvantages. First, an industry-wide standard would require a great deal of information about the industry at issue. For some industries, acquiring this information might take more time and resources than a single-chemical rule.[40] Second, since a small number of firms would bear the cost of industry-wide regulation, OSHA should expect significant and perhaps coordinated business resistance.[41] Because industry-wide standards tend to focus on the feasibility of employing technologies across entire industries, OSHA is more than ordinarily subject to industry complaints that it is intruding too deeply into the day-to-day operation of individual plants.[42] This problem would be intensified if OSHA had difficulty defining what constitutes a discrete industry, a problem that frequently plagues EPA in promulgating standards under the Clean Water Act.[43] Firms that are included could claim unfair discrimination; firms that are left out would fight any attempt to include them. Third, workers would oppose the generic approach if OSHA began to make trade-offs in the stringency of exposure limits for different chemicals. Since individual workers are often exposed to only a single chemical, they would gain no benefit from any trade-offs in the level of protection negotiated between OSHA and industry.[44]

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[39] See Interview with David Vladeck, supra note 9 (industry-wide standards would speed regulation in industries where compliance is easier). For example, various industries reacted differently to OSHA's proposal to limit exposure to benzene to one ppm. See H. PERRITT, ANALYSIS OF FOUR NEGOTIATED RULEMAKING EFFORTS, 1985 ACUS 637, 698 (cited hereinafter as RULEMAKING EFFORTS). The petroleum chemical and rubber industries were able to tolerate a one-ppm standard, but the steel industry vigorously objected to that limitation. Moreover, each of the industries differed concerning their opposition to other aspects of the proposed standard. Id.

[40] Telephone Interview with Mr. Charles Gordon, supra note 38.

[41] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 27-28 (industry vigorously opposes regulation that imposes significant costs); Telephone Interview with Ms. Margaret Seminario, supra note 24. OSHA might be able to offset this effect, however, by engaging in consensus building through negotiated rulemaking or other similar techniques. See supra note 38 and accompanying text (industry-wide rules opportunity for consensus building); see Part IV A infra (OSHA should consider negotiated rulemaking before engaging in rulemaking).

[42] Telephone Interview with Dr. Imogene Sevin, Health Standards Directorate, OSHA (Nov. 3 & 5, 1986).

[43] Interview with Frank Frodyma, supra note 9; Interview with Dan Jacoby, supra note 36. See also A. KNEESE & C. SCHULTZE, POLLUTION, PRICES AND PUBLIC POLICY 62 n.9 (1975).

Fourth, the generic approach could also create significant opposition from persons outside of the regulated industry. If workers in other industries were exposed to the same chemicals, they might object that the agency had discriminated against them by failing to regulate their exposures.[45] Such discrimination might be overturned on appeal, unless OSHA provided a reasoned explanation for its distinction.[46] Even if the choice were justifiable as a matter of administrative efficiency, some might find the distinction unethical.[47] Even if OSHA otherwise regulated the same chemical by promulgating standards for other industries, workers might still object if the agency ended up adopting different exposure limits.[48] More likely, although OSHA might fully intend to regulate the same hazard in other industries, it might never get around to fulfilling that responsibility.[49] This would be especially likely if only a limited number of workers were exposed to a chemical outside of the industry being regulated.

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[44] Interview with Jack Sheehan, United Steelworkers of America, in Washington, D.C. (Oct. 30, 1986). This possibility would be greater if the agency engaged in negotiated rulemaking. *See* Part IV *infra* (negotiated rulemaking invites trade-offs between interested parties).

[45] Interview with John Martonik, Directorate of Health Standards, OSHA, in Washington, D.C. (Sept. 26, 1986) (Unions oppose any approach that creates "second-class" citizens who are not protected from some hazard); interview with Frank White, Deputy Assistant Secretary, OSHA, in Washington, D.C. (Sept. 26, 1986) ("You have to have a persuasive basis for dealing with only part of the problem"); interview with Barry White, *supra* note 15 ("If I were in the tire industry, I would be angry if OSHA promulgated a standard for the automobile industry that included cadmium.")

[46] *See* United Steelworkers of America v. Auchter, 763 F.2d 728 (3rd Cir. 1985) (OSHA had failed to explain adequately why it could not apply the coverage of the hazard communication rule to all employers instead of to those in certain industries). OSHA presumably would face a similar responsibility if it chose to regulate chemicals in one industry, but not in others. The agency, however, may be able to defend this choice in certain instances. For example, industry-wide standards could be defended in cases where most of the use of a chemical is in one industry, or where use of a chemical is significantly different in one industry as compared to another. Interview with Bob Gombar, *supra* note 23. This approach could also be defended if OSHA intended to regulate use of the chemical in other industries in a separate rulemaking proceeding. Telephone interview with David Vladeck, *supra* note 9. Despite the agency's good intentions, however, it may never get around to adopting a separate standard for workers not covered by the industry-wide standard. *See* note 49 *infra* and accompanying text.

Finally, the generic approach may not result in any significant time and resource savings. If the agency must make a "significant risk" determination for each hazard in the chosen industry,[50] then generic standard may be impossible for some industries, such as the paint and allied products industry, in which literally thousands of unrelated chemicals are used, and in which the identity of the relevant chemicals shifts as production lines change from year-to-year or even batch-to-batch.[51] If an industry-wide standard depended upon an assessment of the risks of these hazards present at a particular time, companies might be able to avoid the standard by simply switching to substitutes that posed different or unknown risks.[52] Even for industries with a fairly stable set of hazards, the only efficiency would result from simplification of the feasibility analysis.[53] It might be possible, however, for OSHA to avoid a chemical-by-chemical risk assessment by making a generic risk determination for the entire industry. In making a significant risk determination on an industry-wide basis, OSHA would focus on processes, not individual chemicals, and decide whether integrated operations posed significant risks.[54] The benefits of any time-saving, however, could be overwhelmed by the additional controversy that such a finding would doubtless entail. OSHA's attempt to write a generic standard for the pesticide industry failed largely because it was simply not administratively feasible to proceed with a generic rule for such a complex and changing industry.[55]

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[47] See, e.g., Interview with John Martonik, supra note 45 (Health professionals would be "uncomfortable" with possibility that some workers receive protection for a hazard and some do not); Interview with Charles Adkins, Director, Directorate of Health Standards, OSHA, in Washington, D.C. (Sept. 26, 1986) ("If a chemical is toxic to anyone, it is toxic to everyone." It therefore would be "criminal in my opinion to allow some people to be exposed to a toxic chemical, but not others.").

[48] Interview with Jack Sheehan, supra note 44; but see Interview with Seminario, supra note 24 ("You would be focusing on an industry with lots of chemicals. So I'm not sure that workers who are exposed to [one of those chemicals] in a different industry would feel cheated.").

[49] See Interview with John Martonik, supra note 45 (OSHA left construction workers out of lead standard and is unlikely to go back and regulate that problem separately).

[50] See Interview with Dan Jacoby, supra note 36 (Industry-wide standards would complicate matters because a risk assessment must be done for each chemical used by the industry); Telephone Interview with Edward Stein, Health Standards Directorate, OSHA (Oct. 21, 1986); Telephone Interview with Arthur Sampson, Kirkland & Ellis (Oct. 24, 1986).

[51] See Interview with Imogene Sevin, supra note 42 (OSHA has had difficulty using generic criteria documents that NIOSH has prepared for some industries for this reason).

The generic approach will be cost-effective only when the foregoing disadvantages can be minimized. When the agency sets priorities, it should attempt to identify discrete industries in which the hazards to be regulated are unique (or where those hazards arise in other industries that can also be regulated), where such hazards are relatively stable over time, where industry-wide regulation might save money for the industry, and where such regulation would be more efficient for OSHA. Therefore:

> **RECOMMENDATION:** OSHA should adopt industry-wide generic standards where appropriate. Considerations in determining the appropriateness of industry-wide generic standards include: (1) whether the industry to be regulated can be discretely defined; (2) whether most of the hazards to be regulated are unique to the industry to be regulated (or to other industries that OSHA plans to regulate in the near future); (3) whether such hazards are likely to be relatively stable over time; (4) whether industry-wide generic rulemaking would be less expensive for the industry to be regulated than standards for individual hazards; and

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[52] Id.

[53] See Interview with Barry White, supra note 15; Telephone Interview with Neil King, Wilmer, Cutler & Pickering (Oct. 28, 1986). In addition, this approach would require OSHA to invest resources to reorganize the structure it uses in the Code of Federal Regulations (CFR) for publishing its standards. At the moment, that structure is oriented to a chemical-by-chemical approach. Interview with Frank White, supra note 45.

[54] See Interview with Margaret Seminario, supra note 24.

[55] Id.

(5) whether the industry-wide generic approach would be more efficient for OSHA.

B. Multi-Chemical Standards

OSHA might also consider promulgating standards that regulate two or more chemicals at one time. In 1974, OSHA promulgated this type of standard for fourteen carcinogens that had similar chemical properties.[56] Some observers recommend that it establish more, including standards for solvents, wood preservatives, dusts, and neurotoxins.[57]

The primary advantage of this approach is that OSHA may only have to prepare one risk assessment for the chemicals being regulated. The feasibility analysis might also be simplified if the same type of abatement techniques could be used for all of the chemicals. OSHA can use the same data for risk analysis, however, only for groups of chemicals that arguably have very similar toxicological characteristics. Otherwise, the "significant risk" requirement may oblige OSHA to undertake a separate risk assessment for each individual chemical. In addition, since there is no guarantee that chemicals with similar toxicological characteristics will be used to perform similar functions, separate feasibility analyses might also be necessary. Finally since different chemicals may be used in many different industries, a multi-chemical standard might well attract a larger number of dissatisfied parties than either the traditional case-by-case chemical approach or industry-wide generic standards.

Nevertheless, OSHA should keep an eye out for situations in which a multi-chemical approach would be cost-effective for the agency. Therefore:

> **RECOMMENDATION:** OSHA should adopt multi-chemical standards whenever they would be cost-effective for the agency. They would be cost-effective if the same (or a similar) risk assessment could be used for all of the chemicals and if the feasibility analysis could be simplified because similar abatement techniques are available.

C. Work-Practice Standards

A work-practice standard is one that requires the use of some technology or work practice that protects workers. Good examples are OSHA's hazard communication rule and its medical and exposure records access rule.[58] Both rules apply to workers in many industries, and they apply regardless of the type of hazard to which the worker is exposed. Moreover, both seek to protect the worker by a method other than setting an exposure limitation.

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[56] See note 6 supra and accompanying text.

[57] See, e.g., Interview with Karl Kronebusch, supra note 37.

OSHA can set work-practice standards in two ways. In many of its individual health standards, OSHA requires employers to provide general services such as exposure monitoring, employee training and education, recordkeeping, posting warning labels and signs, and the removal of susceptible workers to alternative work as a medical precaution.[59] OSHA could require the same, or some of the same, protections for any employer regulated by some or all of the 1971 Table Z standards.[60] In appropriate cases, OSHA could also specify what procedures constituted adequate protection of workers under certain general conditions. For example, OSHA is presently considering a rule regulating the use of respirators.[61] It could also regulate other types of protections, such as proper ventilation techniques for chemical holding tanks.[62]

Generic work-practice standards can protect a large number of workers in many industries, especially if they address activities that can reduce health and safety risks in numerous workplace contexts (such as wearing safety shoes and goggles and specifications for the proper fit for respirators). They can also complement traditional chemical-by-chemical health standards setting by addressing work-practice requirements that are by-and-large independent of the toxicological effects of individual chemicals. In either case, OSHA can made generic risk and feasibility assessments, as it did in its hazard communication rule.[63]

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[58] *See* note 8 *supra* and accompanying text.

[59] *See* King Interview, *supra* note 53; note 8 *supra* and accompanying text.

[60] *See* Interview with John Martonik, *supra* note 45 (OSHA should consider a standard that requires every employer to have a safety and health education program); Interview with Jacoby, *supra* note 36; note 82 *infra* and accompanying text (OSHA should adopt such protections for employers covered by 1971 standards or any update of them).

[61] REGULATORY PROGRAMS, *supra* note 32, at 260-261.

[62] Interview with Karl Kronebusch, *supra* note 37.

[63] *See* *supra* notes 8-9 and accompanying text.

Because the standards do not focus on a particular chemical or a particular industry, opposition to their implementation may be moderated.[64] On the other hand, work-practice standards will probably not be successful in specifying practices that are foreign to particular industries or that are impossible to implement in some industries. This suggests that OSHA should provide for variances in cases where the standards are clearly inappropriate. Finally, to the extent that work practice standards tend to address relatively uncontroversial "boiler plate" aspects of individual standards, they are not likely to reduce OSHA's overall workload appreciably. Still, they can sometimes be quite useful in eliminating the need to address recurring issues in individual proceedings. Therefore:

> **RECOMMENDATION:** OSHA should adopt generic work-practice standards whenever they are appropriate. Such standards would be appropriate if a similar hazard in many industries exists that can be regulated by one rule, if the same (or a similar) work-practice would be effective in all of those industries, and if a generic risk and feasibility findings can be made.

III. Performance and Information Standards

A. Performance Standards

OSHA has recognized that it has been widely criticized for its use of design safety standards, which order industry to use one specific safety design, rather than performance standards, which order industry to meet certain safety goals by whatever safety design they choose.[65] This orientation derives in part from the pattern set when the agency was established. At that time, OSHA adopted thousands of safety standards based on voluntary industry safety and health codes.[66] In doing so, OSHA converted discretionary guidelines into required design standards because the voluntary codes often specified design requirements.[67]

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[64] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 27-28 (industry vigorously opposes regulation that imposes significant costs); compare notes 41-44 supra and accompanying text (industry-wide standards could face significant opposition from firms covered).

[65] See REGULATORY PROGRAM OF UNITED STATES, supra note 32, at 222-23; see Reforming OSHA, supra note 29, at 248 (criticism of use of design standards); 1981 Oversight Hearing, supra note 14, at 156 (Statement of Robert Thompson, U.S. Chamber of Commerce) (same criticism).

[66] Id.; see REPORT ON RULEMAKING PROCEDURES, supra note 14, at 11 (Congress ordered OSHA to adopt voluntary, consensus industry codes).

In the health areas, however, OSHA has used performance standards. Most health standards for chemicals, for example, specify an ambient exposure level that employers must meet, but they are generally free to choose the abatement technology that will most inexpensively attain the standard. Other provisions of the health standards that require additional protections, such as suitable protective equipment, control procedures, and monitoring of exposure levels, have been design requirements.[68] However, some of OSHA's other standards have been performance standards. The hazardous warning standard permits firms to design their own labeling systems, and the proposed grain-handling facilities standard allows a firm to use any one of several methods to decrease grain dust.[69]

Critics object to design standards because they can impose greater costs than equally effective alternatives, they require revision every time a technological change takes place, they are difficult to apply when work situations and machines vary, and they are so technical that they can be difficult to understand.[70] Design standards, however, have the advantages of creating precise expectations for employers, facilitating the ability of employees and OSHA inspectors to monitor compliance, and allowing OSHA to insure that new technologies are implemented.[71]

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[67] Reforming OSHA, supra note 29, at 248. For example, OSHA's requirement for band guards for abrasive wheels specifies the required thickness, the minimum diameter of rivets, and the maximum distance between the centers of rivets. Id.

[68] Morgan & Duvall, OSHA's General Duty Clause: An Analysis of Its Use and Abuse, 5 IND. REL. L.J. 283, 319 (1983).

[69] See note 8, supra (hazard communication standard); 49 Fed. Reg. 996 (1984) (grain-handling facilities standard); see Reforming OSHA, supra note 29, at 251 (hazard warning rule is "strongly performance-oriented"); 49 Fed. Reg. 996 (1984); see Reforming OSHA, supra note 29, at 252 (grain-handling facility rule "noteworthy" because of its performance orientation). Firms may (1) clean up the dust whenever it exceeds one-eighth inch, (2) clean up the dust at least once per shift; or (3) use pneumatic dust control equipment. Id.

[70] Nichols & Zeckhauser, OSHA after a Decade: A Time for Reason, in CASE STUDIES IN REGULATION: REVOLUTION & REFORM 203 (1981); OSHA SAFETY REGULATION: REPORT OF THE PRESIDENTIAL TASK FORCE 14, 18 (P. MacAvoy ed. 1977) (hereinafter cited as OSHA SAFETY REGULATION); R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS & ACHIEVEMENTS 75-77 (1976); Reforming OSHA, supra note 29, at 248.

OSHA may find that greater use of performance standards reduces industry opposition.[72] Performance standards would also complement a consensus approach, because OSHA could accommodate various implementation techniques without being forced to choose between them.[73] But performance standards also have disadvantages. Unless they were as protective as design standards, labor opposition could provoke considerable litigation and controversy. Further, employers may lack the expertise and resources to translate performance criteria into suitable engineering designs. This may be especially true for small firms that can ill-afford hiring outside expertise. In addition, employees and OSHA inspectors may find monitoring compliance more difficult.[74]

OSHA must carefully match the nature of the hazard to the appropriate type of standard. For example, performance standards appear appropriate if they offer the same degree of protection as design standards and if they can be easily understood and monitored. Therefore:

> **RECOMMENDATION:** OSHA should consider the use of performance standards whenever appropriate. Such standards would be appropriate if they offer the same degree of protection as design standards, if they can be easily understood and monitored, and if they will lower industry compliance costs.

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[71] OSHA SAFETY REGULATION, _supra_ note 70, at 18. The last advantage, however, depends on whether OSHA is able to update previous standards. In the past, many standards have gone out of date long before OSHA was able to revise them. _See_ REPORT ON RULEMAKING PROCEDURES, _supra_ note 15, at 11-12 (update of 1971 consensus standards has been delayed).

[72] _See_ REPORT ON RULEMAKING PROCEDURES, _supra_ note 14, at 27-28 (industry vigorously opposes regulation that imposes significant costs).

[73] _See_ _supra_ Part IB.

[74] OSHA SAFETY REGULATION, _supra_ note 70, at 19.

B. Information Solutions

The most prominent exception to OSHA's tendency to write command standards is it hazardous communication standard,[75] which requires employers to place a warning label on containers of hazardous chemicals,[76] to provide employees with a material safety data sheet (MSDS),[77] and to train employees to use the information provided.[78] Reformers recommend that OSHA consider additional information solutions, because this approach addresses the failure of labor markets to provide information and, as a consequence, assists those markets to promote additional safety.[79] These reformers therefore consider the hazard communication rule to be one of the most useful health standards ever promulgated by the agency.[80] They also support OSHA's efforts to provide pamphlets and other written materials to workers, and to train workers and employers, but they would like to see the agency spend more money on these activities[81] and to require employers to undertake training activities.[82]

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[75] See supra note 8; see also S. HADDEN, DES AND THE FDA: THE USES OF TECHNICAL ADVICE IN REGULATORY POLICY MAKING 110-18 (Southern Center for Studies in Public Policy 1976); Responses to Occupational Disease, supra note 10, at 1264-65 (description of hazardous warning rule).

[76] 48 Fed. Reg. 53,280, 53,343 (1983). A chemical is considered "hazardous" when it poses a physical or health hazard because it might be a carcinogen or other dangerous to those employee who are exposed "under normal conditions of use or in a foreseeable emergency." Id. at 53,340-41.

[77] Id. at 53,343-44. The MSDS, which is to be developed by the manufacturer of the chemical, must identity the chemical, unless it is a trade-secret and must state whether it is a carcinogen, indicate whether there are applicable exposure limits, and give appropriate safety instructions. Id.

[78] Id. at 58,344.

Increased reliance on information solutions is a promising strategy as long as the information provided to workers is new knowledge about the risks encountered rather than general exhortations to act safely.[83] Nevertheless, reliance on this approach, without more, would not protect all workers adequately. While communicating short term risks to employees can be effective, long-term risks are much more difficult to communicate.[84] Moreover, OSHA cannot easily determine which industries should communicate long-term risks, to specify the kinds of long term risks that should be communicated, and to define the limits on the information that must be considered in deciding what risks must exist in particular workplaces.[85] In addition, complex problems of trade secrecy arise whenever information relevant to communicating workplace risks can also be used by competitors to the employer's disadvantage.[86] Finally, as a practical matter workers in unregulated labor markets have been unable to obtain protection from hazards even when those hazards are well-known to the workers.[87]

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[79] Some observers believe that private transactions between employer and employee can adequately regulate workplace risks when workers are adequately informed. See, e.g., V. VISCUSI, RISK BY CHOICE, ch. 3 (1983); R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT 27-28 (1976); Zeckhauser & Nichols, The Occupational Safety and Health Administration -- An Overview in Comm. on Government Affairs, Study on Federal Regulation, S. Doc. 14, 96th Cong., 1st Sess. 169, 172 (1978). Others argue that employees are not really free to bargain at the low end of the wage scale, especially in times of high unemployment. One union leader has testified (perhaps hyperbolically) that relying upon "hazard pay" as a measure of workers' willingness to accept risks in the context of a "society that historically prides itself in a less than full employment economy" is "the conventional expression of cannibalism in America." Samuels, The Role of Scientific Data in Health Decisions, 32 ENVT'L HEALTH PERSPECTIVES 301, 305 (1979). See also Kelman, Cost-Benefit Analysis in Environmental, Safety and Health Regulations in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS AND METHODS 144 (1982).

[80] See e.g., Reforming OSHA, supra note 29, at 251 (a "most important structural change in regulatory policy").

[81] See e.g., Nichols & Zeckhauser, supra note 70, at 228; ASSOCIATION OF SCHOOLS OF PUBLIC HEALTH, PROPOSED NATIONAL STRATEGIES FOR THE PREVENTION OF WORK-RELATED DISEASES 38 (Part 1) 43 (1986) (promotion of health information).

[82] See, e.g., Nichols & Zeckhauser, supra note 70, at 227-28; R. SMITH, supra note 79, at 77-78; Interview with John Martonik, supra note 45 (OSHA should consider a generic standard to require every company to have a "safety and health program.")

[83] See, e.g., Viscusi & O'Conner, Adaptive Responses to Chemical Labeling: Are Workers Bayesian Decision Makers?, 74 AM. ECONOMIC REV. 942 (1984).

> **RECOMMENDATION:** OSHA should adopt information approaches to complement regulatory commands, but they should not be used as a substitute for health and safety standards.

Information has an additional role at OSHA. One reason for the strength of OSHA's political opposition is the agency's lack of legitimacy among the general public.[88] OSHA must "build a broader constituency articulating its own view of the public interest and setting concrete goals for which the agency would be accountable."[89] This effort should stress the agency's benefits for families and communities as well as for workers themselves. At the moment, even many protected workers fail to understand that OSHA regulation has some importance for them.[90] A clear prerequisite to this campaign, however, is the existence of a better system of priority-setting in the agency to establish such concrete goals.[91]

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[84] See S. HADDEN, supra note 75, at 101-13.

[85] Id.

[86] See McGarity and Shapiro, The Trade Secret Status of Health & Safety Testing Information: Reforming Agency Disclosure Policies, 93 HARV. L. REV. 837 (1980).

[87] See, e.g., I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES 570-71, 577 (1981) (study reveals a "virtual absence of a significant wage premium" for asbestos insulation workers even though powerful construction unions and the workers themselves knew of the virulent health hazard presented by asbestos); Responses To Occupational Disease, supra note 10, at 1240-42 (proof that workers can obtain protection from health hazards without OSHA regulation difficult to establish empirically); see generally Abel, Book Review, 83 MICH. L. REV. 772, 777 (1985) (reviewing E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982)) (discussion of wage premiums obscures the "compulsion and exploitation" of workers). See also supra note 30.

[88] See Report on Rulemaking Procedures, supra note 14, at 32.

[89] Levin, supra note 22, at 39.

IV. Building Consensus

A. Negotiated Rulemaking

In the past few years, several agencies have relied on negotiated rulemaking procedures for drafting the text of proposed regulations,[92] and the idea has received a strong endorsement from the Administrative Conference of the United States (ACUS).[93] Negotiated rulemaking involves broad discussions among all interested parties with the goal of arriving at a consensus on a proposed rule.[94] The agency must appoint an official to convene and organize the negotiations, and it can also appoint a mediator to facilitate agreements.[95] Ground rules for the negotiations are established by the participants at the outset.[96] The negotiators then meet until they have reached agreement, until they have agreed that they will not reach agreement, or until a previously imposed deadline. Depending on how intensely the negotiators go about their work, the entire process can consume from six months to a year.

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[90] Id. (only 35% of workers in one poll thought OSHA regulation was important to them).

[91] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at Part II (OSHA must expand its priority-setting process).

[92] See RULEMAKING EFFORTS, supra note 39, at 677-745 (OSHA, FAA, and EPA have used negotiated rulemaking).

[93] Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1985 ACUS 23-27 (cited hereinafter as 1985 ACUS Recommendation); Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 47 Fed. Reg. 20708 (1982) (codified at 1 C.F.R. §305.82-4 (1984)).

[94] 1985 ACUS Recommendation, supra note 93, at 25. The agency's role can range from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Id. See generally Negotiating Regulations, supra note 22, at 57-67 (agency has several possible roles in negotiated rulemaking).

[95] 1985 ACUS Recommendation, supra note 93, at 26; see generally Negotiating Regulations, supra note 22, at 67-82.

[96] See Negotiating Regulations, supra note 22, at 82-92.

If the negotiations are successful, the agency should be able to promulgate the proposed rule with substantial cost and time savings. Other advantages include the avoidance of litigation, the possibility of more accurately identifying the real concerns of the parties (because they do not engage in the posturing that occurs in litigation), the opportunity to identify the intensity of the parties' concerns over various issues, and the legitimacy the promulgated rule will enjoy because it was a joint product of the agency and the parties.[97]

OSHA has used some form of negotiations in rulemaking four times. In 1976, regulations controlling employee exposure to coke oven emissions[98] were adopted in accordance with agreements reached among OSHA, industry, and organized labor.[99] In 1983, negotiations were used to a limited extent, without agency involvement, in resolving disagreements between industry and labor[100] concerning the cotton dust standard.[101] In the same year, OSHA sponsored more elaborate negotiations involving the steel, rubber, and petrochemical industries and labor to develop a revised standard for benzene.[102] This effort was managed by Phillip Harter, who is considered a leading expert in this form of dispute resolution.[103] Although there were some agreements, the process ultimately failed because of disagreements concerning other matters.[104] Finally, OSHA is currently using negotiated rulemaking to produce a standard for MDA (4,4' Methylenedianiline).[105]

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[97] See id. at 28-31.

[98] Exposure to Coke Oven Emissions, 41 Fed. Reg. 46,742 (1976).

[99] RULEMAKING EFFORTS, supra note 39, at 746. These efforts, however, did not forestall a legal challenge to the regulations. See Iron & Steel Institute v. OSHA, 577 F.2d 825 (3rd Cir. 1978) (affirmed emission standard, rejected requirements mandating new research and qualitative tests for respirators). Moreover, not everyone agrees that the negotiations were entirely successful. See, e.g., Interview with Jack Sheehan, supra note 44 (labor and management unable to agree on some key issues).

[100] RULEMAKING EFFORTS, supra note 39, at 747. Counsel for the industry and labor met informally to attempt to resolve about 15 issues in dispute between them during the hearing OSHA held on the standard. Agreement was reached concerning most of those issues and they parties adjusted how they wrote their briefs accordingly. Id.

[101] 43 Fed. Reg. 27,350 (1978); see RULEMAKING EFFORTS, supra note 39, at 747.

[102] See RULEMAKING EFFORTS, supra note 39, at 677.

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[103] The endorsement by ACUS of negotiated rulemaking was based on a report written by Harter. See Negotiating Regulations, supra note 22, at 1.

[104] See RULEMAKING EFFORTS, supra note 39, at 677. One explanation for this failure is that changes in the political climate and dissension within represented interests made agreement too risky for the participants. Id. Another is that industry representatives could not gain the agreement of those they represented and that unions believed new research justified a more stringent standard than could be negotiated. Regulatory Reform & OSHA, supra note 13, at 455. Failure may have also been caused because OSHA did not start the process until after the parties had taken positions that they could not comfortably abandon. Interview with Barry White, supra note 15.

[105] Recommendations For Proposed OSHA Rule Completed by Mediated Rulemaking Rulemaking Committee, OCCUP. SAFETY & HEALTH REP. (BNA) 1451 (May 26, 1987); RULEMAKING EFFORTS, supra note 39, at 748.

Some observers believe negotiated rulemaking will not work at OSHA,[106] while others are more optimistic.[107] The doubters argue that there is too much distrust between management and labor for this idea to function effectively,[108] that its usefulness is limited because OSHA and labor have only a limited number of experts who can participate,[109] and that OSHA uses regulatory negotiation for chemicals like benzene to stall difficult decisions.[110] Another potential problem is that negotiated rulemaking will not be successful unless the parties believe that if they do not negotiate an agreement, a decision will occur anyway.[111] Given OSHA's past failure to promulgate standards expeditiously, industry representatives may perceive little risk in the failure of negotiations and therefore lack incentive to compromise.[112] Finally, agency employees may attempt to torpedo any negotiations. Health professionals may object that the process compromises OSHA's statutory commitment to reducing risks, and agency lawyers may feel their role and influence is reduced.[113]

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[106] See, e.g., Interview with Karl Kronebusch, supra note 37_ (negotiated rulemaking may have a limited application at OSHA); Interview with Ben Mintz, Professor of Law, Catholic University, in Washington, D.C. (Sept. 25, 1986) (there are "serious doubts" that negotiated rulemaking can work); Interview with David Vladeck, supra note 9 (atmosphere "too adversarial" for negotiated rulemaking to work); Rothstein, Substantive and Procedural Obstacles To OSHA Rulemaking: Reproductive Hazards As An Example, 12 B.C. ENV. AFFAIRS L. REV. 627 , 663 (1985) (former OSHA administrators Dr. Morton Corn and Dr. Elu Bingham were "skeptical" about negotiated rulemaking); see generally Schuck, Litigation, Bargaining, & Regulation, REGULATION, July/Aug., 1979, at 34 ("[D]irect bargaining between interests will probably never play a major role in the development of regulatory policy and regulatory decisions."); cf. Thompson, Deregulation by the Bureaucracy: OSHA and the Augean Quest for Error Correction, 42 PUBLIC ADMIN. REV. 202, 211 (1982) (cited hereinafter as Augean Quest) (conflict at OSHA "comes to be experienced as an ongoing morality play -- as a contest between good and evil -- rather than as an expression of differences among parties with potentially reasonable points of view.")

[107] See RULEMAKING EFFORTS, supra note 39, at 749 (OSHA personnel believe negotiated rulemaking may work in certain cases); Rothstein, supra note 106, at 663 (former OSHA administrators Patrick Tyson, Gary Stobel, and Dr. Leonard Vance were "optimistic" concerning negotiated rulemaking).

[108] Interview with Ben Mintz, supra note 106.

[109] Interview with Karl Kronebusch, supra note 37.

[110] See, e.g., BNA Occupational Safety and Health Reporter, May 24, 1984, at 1339 (Union representative criticizes OSHA for using mediation as a means to delay benzene rulemaking).

[111] Negotiating Regulations, supra note 22, at 47.

Supporters counter that several conditions are required for a successful result[114] and that many of those were missing in the benzene negotiations.[115] They suggest that labor and management reach agreements in collective bargaining[116] and that OSHA can have similar success in appropriate cases, especially if it is a more active participant in the negotiations.[117] They also suggest that even if negotiations fail, OSHA would still gain a better understanding of the issues and of what the parties can accept.[118]

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[112] Interview with Scott Railton, supra note 9 (OSHA has "chicken & egg problem" that until it becomes a better regulator, industry lacks incentive to negotiate); see Interview with David Vladeck, supra note 9 (negotiated rulemaking will not work because industry lacks incentive to cooperate).

[113] Regulatory Reform & OSHA, supra note 13, at 456; see note 17 supra and accompanying text (OSHA employees favor "pro-protective" values that make it inappropriate to make trade-offs that result in less protection).

[114] Negotiated rulemaking is understood to be most successful when: (1) each party has power to influence the outcome of a pending decision; (2) the number of parties is small enough that negotiations can effectively take place; (3) issues are sufficiently "mature" that the parties are ready to decide them, (4) there is sufficient pressure to resolve the matter because otherwise the agency will do so; (5) the parties have something to gain from the negotiations; (6) there are not fundamental value conflicts between the parties which prevent the negotiation over the outcome; (7) there are a sufficient number of contested issues that trade-offs are possible between the parties; (8) the resolution of the dispute depends on policy decisions for which there are no objective solutions; and (8) the framework of the negotiations include an effective method to implement decisions reached during them. See Negotiating Regulations, supra note 22, at 42-52; see also RULEMAKING EFFORTS, supra note 39, at 671-675.

[115] See RULEMAKING EFFORTS, supra note 39, at 692-93. Benzene was a good candidate for negotiated rulemaking because the formulation of the rule involved several issues, creating the potential for tradeoffs; because those issues were mature and the parties had clearly identified their positions concerning them; because a limited number of parties were involved; and because both sides had the power to influence the ultimate decision. Id. at 692. It was a poor candidate because the positions of the parties had hardened during years of previous controversy and as a result, fundamental values were at stake; because various industries were affected differently so that making trade-offs was complicated; and because it was unclear that the parties had something to gain from negotiation. Id. at 692-93.

OSHA's mixed experiences and the previous disagreements reveal that negotiated rulemaking has important potential, but it may not work in all cases. In particular, negotiated rulemaking is not likely to be successful for large generic rulemaking efforts with precedent setting potential. In addition, it is not likely to be useful in addressing issues, such as the use of respirators versus engineering controls, about which the positions of likely participants have already hardened. On the other hand, negotiated rulemaking might be entirely appropriate for new topics, such as regulating risks posed by genetically engineered microorganisms in the pharmaceutical industry, where positions have not been formed and where large investments have not yet been made. Negotiated rulemaking may also not be successful for topics in which a large number of parties have widely divergent interests. Finally, a precondition to a successful negotiated rulemaking may be a relative equivalence in the power of all participants to affect the outcome of the proceeding if the negotiations fail. A party that "holds all the cards" going into the negotiations, is likely to have a disproportionate impact on the output. Knowing this, weaker parties may refrain from participating at the outset.

This suggests that OSHA should evaluate the possibility of using negotiated rulemaking on a case-by-case basis. In cases where the agency chooses to use the process, it must have some device for quickly jettisoning it when it appears to be failing. Otherwise, the already slow decisionmaking process at OSHA will become even slower.[119] The best solution may be to set a irrevocable deadline for the completion of any regulatory negotiation. Therefore:

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[116] See, e.g., Interview with Scott Railton, supra note 9 (labor arbitrators have managed to obtain agreements between management and workers in difficult circumstances). In collective bargaining, however, the parties negotiate what is perceived to be a stable, ongoing relationship. Thus, if a union gives up something in one year, it expects reciprocity the next time. By comparison, there may be no similar expectation in negotiated rulemaking that there will be a next time. As result, success may be harder to achieve. See Regulatory Reform & OSHA, supra note 13, at 455-56 (collective bargaining can be distinguished from regulatory negotiation). The same parties, however, may be involved in negotiated rulemaking again concerning a different OSHA standard.

[117] See RULEMAKING EFFORTS, supra note 39, at 755 (benzene process would have benefited from OSHA participation); see also, 1985 Recommendation, supra 93, at 25 (sponsoring agency should take part in the negotiations).

[118] See, e.g., Interview with Steven Bokat, supra note 12.

> **RECOMMENDATION:** OSHA should evaluate its current negotiated rulemaking procedure to determine when negotiated rulemaking works most effectively at the agency. When OSHA uses this process, it should develop methods for jettisoning the procedure if it is not working, including the use of irrevocable deadlines for completion of any negotiation.

B. Advisory Committees

Although some agencies obtain valuable scientific advice from advisory committees, OSHA has minimized its use of such committees since 1976.[120] Some observers believe that OSHA should reactivate advisory committees,[121] but others doubt that they can function effectively at OSHA.[122]

1. Advisory Committee Structure

OSHA is authorized to have a permanent advisory committee and temporary committees for rulemaking proceedings. The permanent committee, the National Advisory Committee of Occupational Safety and Health (NACOSH), is composed of twelve members, four of whom are designated by the Secretary of Health and Human Services and the remainder of whom are representatives of management, labor, occupational safety and health professions, and the public.[123] The Committee is to "make recommendations to the Secretary of Labor and the Secretary of Health and Human Services relating to the administration of [the Occupational Safety and Health Act]."[124]

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[119] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 134-40 (many rules take three to six years).

[120] Note 489 infra.

[121] See, e.g., NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 98 (1983) (cited hereinafter as RISK ASSESSMENT IN THE FEDERAL GOVERNMENT); Interview with Bob Gombar, supra note 23 (advisory committees would benefit OSHA decisionmaking); Interview with Scott Railton, supra note 9 (advisory committees would extend OSHA's scientific expertise).

[122] See, e.g., Interview with David Vladeck, supra note 9 (FDA use of advisory committees not comparable to OSHA because they are not composed of representatives of adversarial parties); Interview with Ben Mintz, supra note 106 (advisory committees slow process and lead to greater antagonism between parties).

Rulemaking advisory committees can be appointed whenever OSHA determines that a rule should be promulgated. Membership, which is composed of fifteen or fewer persons, must include at least one designee of the Secretary of Health and Human Services, at least one representative of state health and safety agencies, and an equal number of representatives from labor and management. The Secretary may appoint other persons with expertise in the area of occupational health and safety, but the number of such persons can not exceed the number appointed to the committee as representatives of federal and state agencies.[125]

2. OSHA's Experience With Advisory Committees

OSHA has had a mixed experience with its advisory committees. Although it used both NACOSH and rulemaking committees to some advantage, the agency's limited use of these committees has had the effect of isolating it from potentially useful outside scientific advice.

One past participant found NACOSH had been a useful forum to air important issues:

> The idea of adopting a generic cancer policy was widely discussed by NACOSH long before OSHA decided to promulgate a formal rule. NACOSH was the intellectual testing ground, and a review of the transcript reveals good discussions of all the difficult science-law questions. Reproductive hazards were also discussed with sophistication. The difficulty of assessing OSHA's effectiveness from existing disease and injury data is a

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[123] Id. at §656(a)(1).

[124] Id. at §656(a)(2).

[125] 29 U.S.C. at §656(b)(1). Although rulemaking advisory committees are generally appointed on a ad hoc basis, OSHA has agreed to consult with the Construction Safety and Health Advisory Committee concerning any regulation of the construction industry. 29 C.F.R. §1911.10(a) (1986). This advisory committee had been established originally under the Construction Safety Act, 40 U.S.C. §333(e) (1976), a predecessor to the Occupational Safety and Health Act).

> frequently discussed subject. Research needs and opportunities are often discussed.[126]

A 1982 Administrative Conference report, however, found that NACOSH's role has always been a "secondary" one in OSHA's efforts to set workplace health standards and that at the time of the assessment quoted above it had declined in importance.[127] At this time, OSHA continues to rely on NACOSH, but it has been criticized for failing to use it enough.[128]

In its early years, OSHA also used rulemaking committees. Between 1971 and 1976, most of the major health standard proposals were based on advisory committee recommendations.[129] In 1976, however, OSHA stopped appointing rulemaking advisory committees, and none have been used since that date.[130] Although the agency has not explained this act, others have reported that advisory meetings "did little more than provide a forum for the contending parties -- labor and employers -- to argue with each other"[131], that the committees became "tools for political manipulation,"[132] that OSHA "depart[ed] greatly and with vigorous opposition" from committee recommendations,[133] and that, on balance, the agency found the use of such committees to be a burden.[134]

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[126] Ashford, The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and the EPA, in LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY 172 (J. Nyhart & M. Carrow eds. 1983). It should be noted that Professor Ashford was the chairman of NACOSH for several years and may therefore not be an entirely disinterested observer.

[127] Merrill, Federal Regulation of Cancer-Causing Chemicals, in ADMINISTRATIVE CONFERNCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 147 (1982) ("Both NACOSH and ad hoc committees have been involved in OSHA's efforts to set workplace standards, but their role has always been a secondary one and over time has declined in importance.").

[128] See, e.g., OSHA Administrator Seeks NACOSH Advice On New Methods To Achieve Agency's Mandate, OCCUP. SAFETY & HEALTH REP. (BNA) 1456 (May 5, 1987); Ashford, Advisory Committees in OSHA and EPA; Their Use in Regulatory Decisionmaking, 9 SCI., TECHNOLOGY, & HUMAN VALUES 72, 79 (1984); 1981 Oversight HEARINGS, supra note 12, at 210-211 (Statement of Ray Denison, AFL-CIO) (OSHA should make better use of NACOSH).

[129] Id. at 172; B. MINTZ, OSHA: HISTORY, LAW & POLICY 65 (1984).

[130] B. MINTZ, supra note 106, at 65; PREVENTING INJURY, supra note 4, at 353-64.

OSHA's decision may also have been a response to the deadlines imposed for the use of advisory committees. The Occupational Safety and Health Act requires an advisory committee to submit its recommendations within ninety days of its appointment, but the Secretary of Labor can extend the deadline to no more than two-hundred and seventy days.[135] In a study of deadlines for the Administrative Conference, Professor Tomlinson found that because of logistical problems, this deadline was difficult to meet.[136] The act also requires that OSHA propose a standard within sixty days after receiving the recommendations of an advisory committee.[137] OSHA has also had difficulty in complying with this deadline because it is usually unable to write a proposed standard within the time limits set for it.[138]

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[131] T. GREENWOOD, KNOWLEDGE & DISCRETION IN GOVERNMENT REGULATION 125 (1984) ("Although [advisory committees] reviewed the scientific and engineering information available to the agency and provided an opportunity for public participation, they were only rarely of any real help to the agency in the conduct of its risk assesssments or in the engineering aspects of its analysis of regulatory options."); see L. BARCOW, BARGAINING FOR OCCUPATIONAL SAFETY AND HEALTH 41-42 (1980) ("Although the Standards Advisory Committee provides a convenient forum for alternative viewpoints, it is no well structured to resolve . . . differences [between labor and management]").

[132] Risk Assessment Research, 1984: Hearings on H.R. 4192 Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science and Technology, 98th Cong., 2d Sess. 145 (1985) (Statement of Nicholas Ashford, MIT Center for Policy Alternatives)

[133] Ashford, supra note 127, at 172 (giving the example of OSHA's experiences with a committee on pesticide exposures).

[134] Professor Mintz reports that no advisory committees were appointed in part because OSHA was bothered by the requirements for federal advisory committees established by OMB during the Carter Administration and by the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. §7 (1982). B. MINTZ, supra note 106, at 65.

[135] 29 U.S.C. at §655(b)(1).

OSHA's failure to use rulemaking advisory committees places its decisionmaking entirely within the adversarial mode. According to two critics, OSHA's adversarial orientation is responsible for the failure of one of agency's most important decisions. In 1980, OSHA adopted a general policy that specified the regulatory actions the agency would take if a substance was classified as a carcinogen.[139] One reason it did so was to "precipitate a full-scale public shootout . . . in which all interested parties could aid the agency in forging a policy that could serve as a model for all other government agencies."[140] The rule, however, "produced a cascade of opposition that was reflected not only in the [court] challenges . . . but in efforts in Congress and the executive branch . . . to effect changes."[141]

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[136] Tomlinson, Report on the Experience of Various Agencies With Statutory Time Limits Applicable To Licensing Or Clearance Functions and To Rulemaking, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 207 (1978) ("The part-time representatives of industry and labor who serve on advisory committee must be collected from around the country and must be supplied with adequate information. . . . Committee members have trouble assembling at one time and complain that they do not have enough information or are unable to agree on recommendations.")

[137] 29 U.S.C. at §655(b)(2).

[138] Tomlinson, supra note 136, at 206:

> That time limit is difficult to meet because the recommendations of an advisory committee are not in the form of a proposed standard and require substantial rewriting by the OSHA project officer. Advisory committee recommendations also do not consider the compliance aspects of rulemaking, nor do they include the economic or environmental analysis required for a notice of proposed rulemaking. One to two months of drafting work are usually required to transform an advisory committee recommendation into a proposed rule.

[139] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 25-26.

[140] McGarity, OSHA's Generic Carcinogen Policy; Rulemaking under Scientific and Legal Uncertainty, in LAW AND SCIENCE IN COLLABORATION 79 (M. Carrow & J. Nyhart eds. 1983).

One reason for the opposition was that OSHA had attempted "to define scientific parameters about which there remained wide dispute within the scientific community at large and certainly within the affected communities regulated by OSHA."[142] The agency's failure to invite the informal interchange of scientific viewpoints has been identified as one reason the agency failed to deal successfully with that opposition:

> The OSHA GCP rulemaking . . . was not . . . a shootout of science. . . . Any departures from the standard model [of traditional quasi-formal rulemaking] tended to be in the direction of judicialization rather than in the direction of more-informal [sic] attempts to invite the participation of scientists and facilitate the resolution of scientific issues. [No] shootout of science -- an effective consensus gathering and evaluating of known science -- has been held and fed into the GCP rulemaking.[143]

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[141] Merrill, Comment, LAW AND SCIENCE IN COLLABORATION 105 (M. Carrow & J. Nyhart eds. 1983).

[142] *Id.* at 108.

[143] Nyhart & Carrow, Toward Better Resolution of Regulatory Issues Involving Science and Technology, LAW AND SCIENCE IN COLLABORATION 290 (M. Carrow & J. Nyhart eds. 1983). OSHA did consult with NACOSH before the cancer rule was proposed. *See supra* note 127 and accompanying text. Nyhart and Carrow do not indicate why this consultation was insufficient.

3. **Other Agency Experience With Advisory Committees**

Reports on the use of advisory committees in the government are generally favorable,[144] and the Administrative Conference has recommended their use for peer review of experimental findings and scientific judgments.[145] Advisory committees can assist an agency by explaining complex technical issues, by examining critical questions of scientific judgment, by promoting dialogue among well-known experts, by providing peer review for agency decisions, and by expanding the participation of interested parties in the regulatory decisionmaking process.[146]

Some of the previous advantages can also be obtained through a hearing process in which parties often present expert testimony and relevant scientific data. Advisory committees, however, can be a useful supplement to a hearing system. Dialogue between scientists provides an opportunity to narrow differences and reach consensus, to convey the intensity with which positions are held, and to avoid the extreme interpretations sometimes presented by lawyers in adversarial hearings. When advisory committees function in this fashion, they can improve the credibility of agency decisions and thereby increase their acceptance.[147]

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[144] See Ashford, supra note 127, at 172-73 ("Looking at the question from a general perspective, advisory committees --both science and policy oriented -- have the potential to contribute significantly to facilitating the decisionmaking process in regulatory agencies."); T. GREENWOOD, supra note 131, at 129 ("[T]here can be no doubt that [advisory committee] reviews have led to improvement of the agency's risk assessment documents and have provided useful opportunities for interested parites and others to present both views and information."); PRODUCT SAFETY & LIABILITY REP. (BNA) 915 (DEC. 2, 1983) (Consumer Product Safety Commission Vice-Chairman Terrence Scanlon believe Advisory committee useful to his agency); see generally Merrill, supra note 127, at 135-154 (description of use of advisory committees at FDA, EPA, and Consumer Product Safety Commission (CPSC)).

[145] Recommendation 82-5, 1 C.F.R. §305.82-5 (1987).

[146] See RISK ASSESSMENT IN THE FEDERAL GOVERNMENT, supra note 121, at 98; Ashford, supra note 127, at 166; REPORT ON RULEMAKING PROCEDURES, supra note 14 (FDA advisory committees offer advantages indicated in text); Merrill, supra note 127, at 135-56 (advantages of advisory committees to FDA).

Some agencies rely heavily on rulemaking advisory committees. For example, FDA uses a large, formalized advisory committee system to obtain advice concerning both drugs and human devices. The Center for Drug and Biologics at FDA has eighteen permanent advisory committees and the Center for Devices and Radiological Health has nineteen such committees.[148] Voting members of committees, who are selected by FDA, must have "expertise in the subject matter with which the committee is concerned and have diverse professional education, training, and experience so that the committee will reflect a balanced composition of sufficient scientific expertise to handle the problems that come before it . . . ." Nonvoting members "[represent] all interest persons within the class which the member is selected to represent." They are selected by interested organizations, and they need not have technical expertise. Because they represent specific interests, nonvoting members are not subject to the conflict-of-interest requirements applied to voting members, but because of such conflicts, they are not allowed to vote.[149] Advisory committees can be convened by the Commissioner of FDA at his own initiative, or in response to a request from the committee, or from an interested party.[150] Procedures for committee meetings are subject to detailed regulations and the advice and recommendations of a committee are ordinarily communicated in a written report.[151]

FDA has had a more positive experience with advisory committees than OSHA. An independent study of the committees concluded:

> Experts provide valuable advice on complex technical issues and assist the agency in deciding critical questions of scientific judgment. . . .

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[147] See Shapiro, Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry, 1986 DUKE L.J. 288, 306-07 (cited hereinafter as Scientific Issues).

[148] See 21 C.F.R. §14.100 (1986) (list of FDA's standing advisory committees).

[149] Id. at §14.80(b)(1)(i) (requirements for voting members); at §§14.86(b)(1) §§14.80(b)(2)(i), 14.80(e) 14.84 (requirements for nonvoting members)

[150] See, e.g., id. at §§14.171-172 (utilization of advisory committees for human prescription drugs).

[151] Id. at §§§14.174, 14.20-39, 14.60-75.

> [A]dvisory committees [also] offer FDA a dialogue with the nation's foremost experts in drug therapy. The Committees are thus an important source of peer review for proposed FDA decisions. For these reasons, use of advisory committees increases public and industry acceptance of FDA decisions and improves the credibility of the agency.[152]

The primary disadvantage of advisory committees, beyond their not terribly burdensome expense to the agency, is their potential for departing the confines of science, where technical expertise is critical, and wandering into the realm of policy, where technical expertise has no particular virtue. Most of the questions that would come before a typical OSHA scientific advisory committee are mixed questions of science and policy that cannot easily be separated into their scientific and policy constituents. A good example is the level of certainty demanded before drawing a conclusion that a possible cause is associated with a particular effect. Scientists are generally unwilling to draw cause-effect conclusions from statistical data absent a high degree of confidence that the observed association did not occur by chance. For purposes of publishing scientific papers and establishing scientific reputations, this degree of conservatism is entirely appropriate. But a policymaker may decide not to demand such a high degree of confidence when the lives of hundreds of workers are at stake. In other words, the policymaker may decide to err on the side of safety. Another policymaker implementing a less protective policy might require a greater degree of confidence. The important point is that the degree of confidence required for drawing cause-effect relationships for regulatory purposes is a question of policy, not science.

Most agency policymakers understand the difficulty in separating questions of pure science from their policy components and that scientific advisory committees are only competent to address purely scientific questions. Unfortunately, scientific advisory committees can be useful to agency decisionmakers even when operating beyond their competence. As long as the policy aspect of a science/policy question is not immediately apparent to the public, the decisionmaker can use scientific advisory committees to shield himself from criticism for policy choices by maintaining that the decision was made in accordance with the neutral advice of an independent scientific advisory committee. For this strategy to work, the decisionmaker must ensure that a majority of the scientific advisory will supply the "proper" policy component to science/policy questions. This can be relatively easily accomplished by "stacking" the committee with scientists whose past actions indicate that they will generally resolve science/policy questions in accordance with the decisionmaker's policy preferences. This probably explains the "hit lists" that were circulated during the transition of administrations in 1981 which suggested that certain members of EPA scientific advisory committee be purged.[153]

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[152] DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, FINAL REPORT 52 (1977).

4. OSHA's Future Use of Advisory Committees

FDA has had a more positive experience with advisory committees than OSHA because of the type of committee Congress created. At FDA, voting members are chosen on the basis of their expertise and they do not necessarily represent any constituency.[154] Although there are representatives of specific interests like labor, consumers, and others, they are not voting members.[155] In most instances, committees are able to operate by consensus.[156] An OSHA advisory committee must contain an equal number of representatives of labor and management[157] and the agency is limited in the number of independent experts it can appoint.[158] Undoubtedly, this make-up contributes to the politicized and adversarial nature of OSHA committees and may limit the range of their expertise.[159]

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[153] See T. GREENWOOD, supra note 131, at 229 ("Expert panels do not admit (and may not even recognize) when they go beyond science or engineering knowledge in reaching conclusions); McGarity, Risk and Trust: The Role of Regulatory Agencies in Dealing With Risk: The Courts, the Agencies and Congress 12 (Presentations delivered at the Fourteenth Annual Conference on the Environment, 1985).

[154] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 15. See supra note 148 and accompanying text.

[155] See supra note 149 and accompanying text.

[156] DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT: THE USE OF STANDING ADVISORY COMMITTEES BY THE BUREAU OF DRUGS OF FDA 103 (1977).

[157] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 16.

[158] No committee can be more than fifteen persons and at least two of these persons must be representatives of other government agencies. See id. at 16. Further, OSHA must appoint the same number of representatives from labor and management to the committee. See id. For any remaining positions, OSHA can appoint independent experts, but the agency must appoint one person from a governmental agency for every independent expert who is appointed. See supra id.

Some critics believe that as long as advisory committees are organized in the current manner, OSHA is better off not using them. They argue that labor and industry members will normally be antagonistic, that OSHA has had a poor experience with such committees in the past, and that there is no reason to assume that they would work any better in the future. They believe that use of such committees therefore only slows decisionmaking and brings little benefit to the agency.[160] Proponents respond that there are indications that these committees can work in appropriate circumstances. For example, early in the Auchter administration, OSHA sponsored a conference involving labor, management, and other experts to discuss how the agency should undertake inspections of working conditions. According to one participant, OSHA was "amazed" at how much agreement existed among the participants.[161]

If the proponents are correct, OSHA might gain some advantage from advisory committees even with their present structure. Although OSHA must include an equal number of representatives from labor and management on each committee, the statute does not specify how many such representatives must be appointed. If OSHA appointed only one person each from labor and management, it would be able to appoint a majority of the committee based on their expertise. These members would be either independent experts or scientists from the Department of Health and Human Services or state health and safety agencies.[162] A committee with a majority of independent or government scientists might have a better chance of operating as a scientific body, rather than as a group of individual advocates for management or labor.[163] The Administrative Conference has recommended that "[m]embers of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields."[164]

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[159] See id. (ad hoc advisory committees were politicized at OSHA); Merrill, supra note 127, at 148 ("The reluctance of many members of ad hoc committees to express views unpopular with the groups they represent has led many OSHA officials to question Congress' original conception.").

[160] See, e.g., Interview with David Vladeck, supra note 9 (advisory committees would not work because industry will not cooperate); Interview with Ben Mintz, supra note 106 (conflict would erupt between industry and labor in advisory committees).

[161] Interview with Bob Gombar, supra note 23; see Occupational Safety and Health Improvements Act of 1980: Hearings On S. 2153 Before the Senate Comm. on Labor & Human Resources, 96th Cong., 2d Sess. 232 (1980) (testimony of Sheldon Samuels, Director, Health, Safety & Environment, AFL-CIO) (despite controversy, advisory committees worked well at OSHA).

OSHA, however, would still be confronted with the problem of compliance with the Act's deadlines for advisory committees. While the deadlines are not easily met, compliance is feasible. Advisory committeess have completed their work within the statutory time limits and the statutory time limit gives OSHA increased leverage in demanding prompt action from its advisory committees. Moreover, it is possible to issue a proposed standard within the sixty-day time limit if OSHA closely monitors the work of the advisory committee and has done some advanced work before formally receiving the committee's recommendations.[165] OSHA could also limit the number of issues that it sends to the advisory committee. This would allow OSHA to prepare in advance the notice of the proposed rule except for those protections concerning the issue submitted to the advisory committee. Nevertheless, if OSHA used an advisory committee it would have to devote special attention and resources to assure compliance with the deadlines. As a result, OSHA may not wish to use advisory committees except for especially difficult scientific and technological issues.

Although advisory committees present special problems for OSHA, they could also provide important benefits. If OSHA was doubtful that these committees would be of value, it could try them as an experiment. Therefore:

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[162] The rulemaking committees are to be fifteen persons or less. If only two persons represented either labor or management, the remaining members of the committee would be one required appointee from a state health and safety agency, one required designee from Health and Human Services, and an equal number of independent experts and additional representatives from state and federal agencies. See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 98. Since both the independent experts and additional representatives from state and federal agencies could be highly qualified scientists, the majority of the committee could be be made up of such scientists.

[163] Rothstein, supra note 106, at 655-56.

[164] Recommendation 82-5, supra note 145.

[165] Tomlinson, supra note 136, at 206-07.

> **RECOMMENDATION:** Because other health and safety agencies have benefitted from the recommendations of rulemaking advisory committees, OSHA should reactivate its use of them, but it should also take steps to avoid the problems it encountered when it previously utilized these committees. To promote a scientific orientation in the committee, OSHA should increase the proportion of independent and government scientists appointed. To avoid problems of compliance with statutory deadlines for advisory committees, OSHA should appoint committees only for especially difficult scientific and technological questions and it should limit the number of questions assigned to a committee.

V. The Hearing Process

A. Hybrid Rulemaking Procedures

OSHA uses a hybrid form of rulemaking to promulgate health standards. According to its enabling act, OSHA can use informal rulemaking unless an interested person requests a hearing, which almost always happens.[166] OSHA regulations provide that an Administrative Law Judge (ALJ) is to preside, that the ALJ shall provide for cross-examination on crucial issues, and that a verbatim transcript shall be kept.[167] OSHA typically requests witnesses to pre-file testimony, to limit oral presentations to ten or fifteen minutes, and to participate in a pre-hearing conference with the agency staff. Whenever possible, the agency also limits the issues to be covered at a hearing. Finally, OSHA arranges for experts to explain the basis of its proposals and, more generally, to answer questions and help develop a full technical record on the issues in the proceeding. For example, OSHA presented 46 experts in the field of cancer research in the hearing held for the agency's cancer policy.[168]

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[166] The Occupational Safety and Health Act provides:

> On or before the last day of the period provided for submission of written data or comments . . . any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational or health standard to which objections have been made and a hearing requested, and specifying a time and place for such hearing.

Id. at §655(b)(3).

OSHA has held a hearing for all but one of its eighteen health standards and for all but nine of its twenty-six safety standards. PREVENTING INJURY, *supra* note 4, at 363-64.

[167] 29 C.F.R. §1911.15(b).

Although OSHA is required to hold a hearing, the agency is not required to use formal rulemaking.[169] OSHA could therefore forgo some of these hearing procedures, such as cross-examination, but such changes are unlikely to have much effect on the pace of OSHA decisionmaking. The time elapsed in hearings is only a small portion of the time elapsed during OSHA decisionmaking and judicial review.[170] For that reason,

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[168] B. MINTZ, *supra* note 106, at 63-64.

[169] According to *United States* v. *Florida East Coast*, 410 U.S. 224 (1973), an agency is required to use formal rulemaking only when Congress has required that a rule be made "on the record after an opportunity for an agency hearing." Congress made no such requirement of OSHA. *See* REPORT ON RULEMAKING PROCEDURES, *supra* note 14, at 22.

[170] The following chart indicates the time elapsed for the various components of the process:

Standards	Hearing	Agency Decision-Making	Judicial Review	Entire Process
Asbestos	3 days	4 mos.	21 mos.	25 mos.
14 Carcinogens	3 days	11 mos.	10 mos.	21 mos.
Vinyl Chloride	6 days	5 mos.	2 mos.	7 mos.
Coke Oven Emissions	75 days	63 mos.	16 mos.	79 mos.
Benzene	22 days	21 mos.	28 mos.	49 mos.
DBCP	2 days	6 mos.	none	6 mos.
Arsenic	12 days	51 mos.	34 mos.	85 mos.
Lead	49 days	69 mos.	20 mos.	89 mos.
Cotton Fiber Dust	7 days	44 mos.	35 mos.	79 mos.
Acrylonitrile	11 days	18 mos.	none	18 mos.
Noise	24 days	100 mos.	46 mos.	146 mos.

See Responses to Occupational Disease, *supra* note 2, at 1305-09 (time elapsed for agency and judicial review except for noise standard); PREVENTING INJURY, *supra* note 4, at 363 (time elapsed for agency and judicial review for noise standard); McGarity, *OSHA's Generic Carcinogen Policy: Rulemaking Unclear Scientific and Legal Uncertainty*, in LAW AND SCIENCE IN COLLABORATION 78 (J. Nyhart & M. Carrow eds. 1983) (time elapsed for hearings).

streamlining the hearing is not likely to aid the agency greatly in increasing its regulatory output.[171]

Moreover, although not everyone agrees, hybrid procedures may be useful in resolving certain types of scientific disputes.[172] In fact, one long-time analyst of OSHA believes agency decisionmaking has generally benefited from the hybrid approach.[173] If these perceptions are accurate, the adoption of a more informal process may be counterproductive. If the quality of OSHA's decisionmaking would be adversely affected, the agency might find itself the subject of a greater number of judicial remands and a loss of public confidence.

B. Advance Notices of Proposed Rulemaking

Since most of the delay in rulemaking occurs outside of the hearing itself, OSHA might benefit from changing the way in which it uses Advance Notices of Proposed Rulemaking (ANPRs). OSHA has shown an increasing tendency to rely routinely on ANPRs to solicit information from regulated industries and other interested parties.[174] Although the ANPR can be effective tool for acquiring information and ideas at an early stage in a rule's development,[175] there is a general feeling among agency staff and outside practitioners that it rarely results in the production of useful information for OSHA.[177] Outside parties are simply unwilling to scour their files for information at this stage, and to the extent that information that is not readily available to OSHA is available to outside parties, they are unwilling to provide it and incur the risk of revealing or foreclosing later strategies.[178] At the same time, the ANPR slows the progress of agency contractors. They understandably want to delay their reports until they have had an opportunity to assimilate any information that an ANPR produces.[179]

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[171] McGarity, OSHA's Generic Carcinogen Policy: Rulemaking Unclear Scientific and Legal Uncertainty in LAW AND SCIENCE IN COLLABORATION 78 (J. Nyhart & M. Carrow eds. 1983).

[172] Scientific Issues, supra note 146, at 297-98.

[173] B. MINTZ, supra note 106, at 65-66.

[174] OSHA used an ANPR in only one of the first sixteen health standards it promulgated and in only one of the first twenty-six safety standards. PREVENTING INJURY, supra note 4, at 363-64. It then used an ANPR in four of the next six health standards it proposed. Id; Responses To Occupational Diseases, supra note 2, at 1308-09.

[175] See ACUS Recommendation No. 76-3, 1 C.F.R. §305.76-3 (1986) (suggesting that ANPRs are effective when: "(1) the scientific, technical or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.")

Although the ANPR may not yield any useful information, it can serve a useful purpose for agency administrators. Since it can delay the rulemaking schedule by six months to a year, the ANPR process can be used by them to avoid hard decisions.[180] The ANPR process can be a convenient tool for delay, because it shows some movement by the agency, but it does not necessitate any final decisions. Yet this advantage does not outweigh the harm to workers that might result from delaying the initiation of rulemaking proceedings on health standards.[181] Therefore:

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[177] Telephone interview with Susan Harwood, Health Scientist, Office of Risk Assessment, Directorate of Health Standards Programs, OSHA (October 21, 1986); Telephone interview with Arthur Gas, Industrial Hygienist, Directorate of Health Standards Programs, OSHA (October 30, 1986); Telephone Interview with George Cohen (Oct. 28, 1986).

[178] Interview with Susan Harwood, *supra* note 177.

[179] Interview with Charles Gordon, *supra* note 38.

[180] Telephone interview with Edward Stein, Directorate of Health Standards Programs, OSHA (October 21, 1986).

> **RECOMMENDATION:** OSHA should not routinely use the Advance Notice of Proposed Rulemaking (ANPR) as an information gathering technique. The ANPR should be used primarily when information that is not available through other vehicles is very likely to be forthcoming in response to the ANPR.

C. **Preparation of the Record**

Some agency staffers and most representatives of beneficiary groups believe that OSHA goes to extreme lengths to perfect the record in a rulemaking proceeding to avoid reversal on appeal.[182] They point to 100 page preambles that discuss every minor contention raised in the comments as evidence of "overpreparation" of the record. Most industry representatives forcefully dispute this idea and contend that OSHA must establish a sound technical basis for its rules. The attorneys in the Solicitor's Office are also convinced that elaborate analysis and documentation is necessary to survive judicial review, and they explain that much of the delay caused by their office is prompted by concern of the quality of the agency's analysis.[183] In their opinion, it is worth spending a few extra months to perfect a Federal Register document if it will avoid an even more time-consuming remand.

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[181] Based on a report prepared by Professor Luneberg, the Administrative Conference has recommended that "where appropriate and feasible," agencies should publish notice of the receipt of petitions for rulemaking and provide a period of time for public comment. Luneberg, Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement, Report to the Administrative Conference of the Unite States (1986); ACUS Recommendation No. 86-6; 1 C.F.R. §305.86-6 (1986). Since many of the rulemaking proceedings at OSHA are in response to petitions, _see Responses To Occupational Diseases_, _supra_ note 2, at 1308-09, this recommendation will directly affect OSHA.

We agree that is is generally a sound practice for any agency to inform the public of a rulemaking petition and to allow public comment on that petition, but we do not read this recommendation to suggest that the agency use this process as a vehicle for gathering technical information. Should OSHA, in response to the ACUS recommendation, adopt a procedure for notifying the public of rulemaking petitions and soliciting public comment, we would urge the agency to put fairly strict deadlines on the response (e.g., 30 days), and we would urge the agency not to use the process as an excuse to delay in moving forward with its own decisionmaking. Otherwise, this process, like the agency's use of the ANPR, could become a vehicle for delaying difficult decisions.

[182] Interview with Susan Harwood, _supra_ note 177; Interview with Barry White, _supra_ note 15.

The problem with preparation of the rulemaking record may have been misstated by the critics. The lawyers in the Solicitor's Office should be free to determine the type of record they believe is necessary for the agency to prevail on judicial review, because they are in the best position to make such a determination. But those lawyers should not be allowed an indefinite amount of time in which to prepare the records. As reported earlier, OSHA has almost no system to establish and monitor deadlines. As a result, work piles up in the Solicitor's Office and the promulgation of rules is delayed.[184]

It is not clear, however, that the Solicitor's Office can become more productive, even under the pressure of strict time deadlines, without additional resources.[185] For example, the Solicitor's Office has assigned only one lawyer to complete the records for safety standards and he is at least one year behind schedule.[186] If the imposition of time deadlines does not increase productivity, OSHA should support a request by the Solicitor's Office to the Secretary of Labor for additional resources.

D. Alternative Hearing Procedures

Although the hearing process at OSHA appears to work tolerably well, the agency may wish to consider whether the use of alternative hearing procedures would be beneficial. A statement of the Administrative Conference recognizes that an innovative hearing method used by the Food and Drug Administration may be useful to other health and safety agencies such as OSHA.[187] This new method, which is called a Public Board of Inquiry (PBOI), consists of a panel of three scientists appointed by the FDA Commissioner. The Board obtains scientific "testimony" within an informal quasi-adjudicative hearing framework, in which the role of lawyers is minimized in favor of a "scientific forum" approach. The Board's decision, however, is an "initial decision" and has the same legal status as an initial decision of an ALJ.[188] Based on FDA's experience in using the PBOI in two cases, the Administrative Conference suggested that "continued experimentation with alternative types of hearing procedures for the resolution of scientific issues is justified." It stated that other agencies, like OSHA, with regulatory programs that depend on scientific determinations, should consider experimental use of a process similar to the PBOI as a voluntary alternative to a hearing that would otherwise be held to resolve issues of scientific uncertainty.[189]

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[183] Interview with Dan Jacoby, _supra_ note 36.

[184] _See_ REPORT ON RULEMAKING PROCEDURES, _supra_ note 14, at Part III A2.

[185] _See_ Interview with Dan Jacoby, _supra_ note 36 (delays in Solicitors Office caused by a lack of resources).

[186] Interview with Barry White, _supra_ note 15.

[187] ACUS Statement 11, Statement on Hearing Procedures for the Resolution of Scientific Issues, 1 C.F.R. §310.11 (1986) [cited hereafter as ACUS Statement 11]. The Conference's action was in response to a report which was later published. _Scientific Issues_, _supra_ note 146, at 288.

VI. Updating of the 1971 Table Z Standards

When OSHA was founded, Congress ordered it to adopt, within two years, "as an occupational safety or health standard any national consensus standard, and any established Federal Standard, unless [it] determine[d] that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."[190] In 1971, pursuant to this authority, the agency adopted some 400 ambient exposure limitations that were contained in the Walsh-Healy Act, and that were originally derived from recommendations of the American Conference of Governmental Industrial Hygienists (ACGIH).[191] Congress intended that workers would be protected under these standards, which are sometimes referred to as the Table Z standards, while OSHA considered more stringent limitations.[192]

This system, however, has not worked as intended. OSHA has been largely unable to update or supplement the Table Z standards,[193] while ACGIH has changed its recommendations, on which Table Z is based, for over 100 chemicals, and it has issued new recommendations for 200 additional chemicals.[194] As a result, at least one million workers are exposed to chemicals that exceed levels in ACGIH recommendations, but in compliance with Table Z.[195]

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[188] ACUS Statement 11, _supra_ note 187, at 193-94; _Scientific Issues_, _supra_ note 146, at 307-18.

[189] ACUS Statement 11, _supra_ note 187, at 194.

[190] 29 U.S.C. at § 655(a).

[191] 29 C.F.R. §§ 1910.1000 (1983); _see Responses to Occupational Disease_, _supra_ note 2, at 1257.

[192] REPORT ON RULEMAKING PROCEDURES, _supra_ note 14, at 11; note 197 _infra_.

[193] _Id._ at 12.

Not surprisingly, both reformers and OSHA agree that it must find some method to update Table Z in an efficient and timely manner.[196] This section considers whether OSHA should take this step, and if so, how it could be best implemented.

A. General Advantages and Disadvantages

If OSHA updated the Table Z standards, employers would be required to comply with the ambient exposure levels specified in those updated tables which should be consistent with the newest ACGIH recommendations. Since many of the ACGIH standards are more protective of workers than OSHA's existing 1971 regulations, workers would be protected to a higher degree than at present. After the updated standards became binding, OSHA could still propose more stringent ambient exposure levels where appropriate, write health standards to complement the Table Z standards (covering work practices, medical removal provisions, warnings, etc.), and write standards for hazards for which there are no ACGIH recommendations. This strategy arguably reflects the congressional plan of establishing a minimum level of protection for workers followed by the implementation of stricter regulation.[197]

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[194] *Id*. at 12.

[195] *Id*.

[196] *See*, *e.g*., PREVENTING INJURY, *supra* note 4, at 14, 22; *see* OCCUPATIONAL SAFETY & HEALTH REP. (BNA) 348 (Sept. 9, 1986) (revision of existing exposure lists a "major priority" for OSHA).

Although this plan would raise the minimum level of protection for workers, whether or not it would be advantageous depends significantly on how easily it could be implemented. If it can be easily implemented, OSHA would have obtained additional protection for workers without threatening its ability to promulgate stricter standards where appropriate. The ease of implementation depends on two factors. First, if this idea were less controversial with industry than the promulgation of stricter standards, there could be some time and resource savings. If organized labor, however, did not accede to this approach, it could still involve the agency in considerable litigation and controversy,[198] unless Congress precluded litigation as it did for the original Table Z standards. Second, the amount of time and resource savings would also depend on whether the update could be implemented on a generic basis.[199] If OSHA had to use a separate rulemaking proceeding for each standard it updated, this project would not be a great improvement over OSHA's current case-by-case approach. Whether OSHA could proceed in a generic manner depends on the interpretation given to the requirements that OSHA must have evidence of significant risk and of feasibility in order to promulgate a health standard.

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[197] 197. See S. Rep. No. 91-1282, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News 5182-83:

> . . . The consensus and other standards issued under section 6(a) would provide a sound foundation for a national safety and health program. However, . . . a large proportion of the voluntary standards are seriously out-of-date. Many represent merely the lowest common denominator of acceptance by interested private groups. Accordingly, it is essential that such standards be constantly improved and replaced as new knowledge and techniques are developed.

See also AFL-CIO v. Brennan, 530 F.2d 109, 115 (3rd Cir. 1975) ("Adoption of privately promulgated standards was viewed [by Congress] as an interim measure to provide uniform minimum national standards pending plenary action by [OSHA]").

[198] 198. Interview with Scott Railton, supra note 9; Telephone Interview with Mr. Mike Wright, United Steelworkers (October 24, 1986) ("OSHA should not be scoring levels on their prediction of how much of a fight they will get from one side or the other. We will fight them if they are not tough enough.").

[199] 199. See Part IV A1 supra (generic regulations allow agency to cover more workers and more chemicals).

Even assuming that OSHA could proceed generically, this proposal has several important disadvantages. First, the allowable exposure level for any given chemical would probably be less stringent than if OSHA promulgated its own standard for that chemical. Moreover, because the updated standards would address only exposure limitations, they would be less protective of workers than complete OSHA standards. When OSHA promulgates a new standard, it not only limits exposure to a hazard, but it also requires other protections such as exposure monitoring, medical surveillance, removal of employees to other work as a medical precaution, employee training and education, and warning labels and signs.[200] It could be argued that even though this approach would broaden the protection available to workers, it also dilutes OSHA's mandate to seek the most protection feasible for workers.[201]

Second, since nongovernmental ambient exposure levels are voluntary, they are set on a more speculative basis than OSHA regulations and, consequently, are frequently revised.[202] If OSHA were simply to adopt the ACGIH values, it would in essence be relying only on risk thresholds without considering other fundamental concerns, such as the magnitude of the risk, the number of exposed workers, and the costs of compliance.[203] Third, the ACGIH recommendations are not true consensus standards because the group itself does not include representatives of all interested parties such as public interest groups and labor unions. In the past, the ACGIH has sought qualified technical consultants from unions, but the unions have refused to participate on the ground that standard setting should be a government activity.[204] Moreover, the ACGIH process has been criticized for reflecting unduly the perspective of large firms.[205] If this allegation is true, an update of Table Z might have an adverse competitive impact on small businesses or consumers.[206]

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[200] See M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW §§71-72 (1983). In the mid-1970's OSHA considered a generic rule that would have required manufacturers to engage in those protections for chemicals regulated under the 1971 standards, but the project was never completed. See supra REPORT ON RULEMAKING PROCEDURES, supra note 14, at 14. The possibility of promulgating such a rule is considered later. See notes 210, infra and 82, supra (OSHA should adopt specification standards for exposure monitoring, employee training, medical surveillance, and other worker protections).

[201] 29 U.S.C. §655(b)(5) (1982). It can also be argued, however, that this proposal reflects a Congressional intent that OSHA should establish a minimum level of protection for workers followed by implementation of stricter regulation. See supra note 197 & accompanying text.

[202] Viscusi, supra note 79, at 474.

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[203] Id. at 473; see REPORT ON RULEMAKING PROCEDURES, supra note 14, at Part II B2 (priority setting requires consideration of multiple factors in addition to risk threshhold). Analysis of these other considerations are considered necessary to any reasonable priority-setting process. See id.(elements of a priority-setting process).

[204] PREVENTING INJURY, supra note 4, at 257; Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 TEX. L. REV. 1329, at 1381 (no representation of labor in consensus process); see generally D. HEMENWAY, INDUSTRYWIDE VOLUNTARY PRODUCT STANDARDS 90-91 (1975) (voluntary standards are "industry-dominated"; N. ASHFORD, CRISIS IN THE WORKPLACE 250 (1976) (voluntary standards are "business-oriented").

[205] Viscusi, supra note 79, at 473 ("To adopt the ACGIH standards as mandatory guidelines would in effect enable DuPont to set many OSHA regulations."); Hamilton, supra note 204, at 1380, 1383.

[206] Viscusi, supra note 79, at 473; Hamilton, supra note 204, at 1448 (claims that members of standard-setting organizations have discriminated against some competitors are "plausible."); see generally Stigler, The Theory of Economic Regulation, 2 BELL J. OF ECONOMICS & MANAGEMENT SCIENCE 3 (1971) (firms block competition by use of government regulations as barriers to entry).

OSHA could avoid many of these problems by undertaking an independent evaluation of the consensus standards.[207] Without such an independent evaluation, the agency would in effect be delegating decisionmaking power to private entities, and a complete delegation of power to private parties may be unconstitutional.[208] An independent evaluation of consensus standards is also necessary to weed out the sort of obviously inappropriate standards that subjected the agency to ridicule when it adopted consensus standards wholesale, without independent evaluation, in 1971.[209]

An independent evaluation would, of course, entail a loss of some of the time and resource savings of a simple adoption of the nongovernmental standards. To do an adequate job, OSHA would need to have some expertise and a minimum data base concerning the health, safety and feasibility aspects of the standard. Thus, the approach would only be justified if the agency currently possessed both or could meet those requirements more easily than adopting stricter standards. Moreover, if an independent evaluation of a nongovernmental standard is to save the agency time and resources, it must be on the basis of a less complete record of support than that which supports a traditional standard. As practical matter, such a standard is not likely to survive the kind of intense judicial review that has traditionally attended OSHA standard setting. Therefore, OSHA should not attempt this approach if it would be objectionable to a significant number of workers, small manufacturers, or others. If both of these conditions are met, the update could occur in an efficient and timely manner.

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[207] The Administrative Conference of the United States has endorsed agency use of private consensus standards as a basis for regulation, but the Conference recommends that agencies engage in an independent evaluation of those standards before they are adopted. See Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation (Recommendation No. 78-4), 1 C.F.R. §305.78-4 (1986); see also Hamilton, supra note 204 at 1448 (agencies should independently evaluate voluntary consensus standards).

[208] See Carter v. Carter Coal Co., 298 U.S. 238 (1936); see generally Jaffe, Law Making By Private Groups, 51 HARV. L. REV. 201 (1937).

[209] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 29-30 (adoption of inappropriate consensus standards in 1971 created substantial political trouble for OSHA); Interview with Karl Kronenbusch, supra note 37 (adoption of nongovernmental standards might invite same type of political trouble the agency faced in the early 1970s).

The degree of opposition that OSHA will receive from workers will depend in part on their perception of whether OSHA intends adoption of nongovernmental standards to be an interim step. Since the ACGIH exposure levels are generally less strict than the exposure levels set at the level of feasibility, workers are less likely to support an update if they believe OSHA will not pursue more strigent regulation of chemicals as well. OSHA can take three steps to allay such fears. First, it must establish that it can update the Table Z standards with a minimum commitment of resources. Second, it should consider adoption of the some or all of the same protections for the 1971 standards (or any updates) that employers are required to use for OSHA's other health standards.[210] Third, OSHA could demonstrate its good faith by proceeding expeditiously with the standards currently on its agenda in accordance with the priority setting process recommended by ACUS in Recommendation 87-1. Therefore:

> **RECOMMENDATION:** OSHA should attempt to update the 1971 consensus standards An update is appropriate when (1) a generic process can be utilized; (2) the new standard can be evaluated on the basis of risk and feasibility information and expertise available to the agency or easily obtainable, (3) adoption is not objectionable to a significant number of workers, employers, small firms or others, (4) and it can be accomplished with a minimum commitment of resources. OSHA should consider the adoption of new Table Z standards an interim step and should consider requiring additional protections for workers (including protections other than exposure limitations typically included in standards for individual hazards) whenever necessary.

B. Implementation Through Generic Rulemaking

Knowledgable observers have suggested that the most efficient way for OSHA to update its 1971 standards would be a single generic rulemaking proceeding in which OSHA would adopt all of the new standards the agency intended to promulgate.[211] As discussed earlier, if OSHA must use a separate rulemaking proceeding for each standard it updates, this approach would offer little improvement over its current case-by-case approach. Whether OSHA can lawfully proceed in a generic manner depends on the interpretation given to the requirements that OSHA must prove significant risk and technological and economic feasibility.

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[210] See note 200 supra and accompanying text.

[211] See, e.g., Interview with Bob Gombar, supra note 23 (OSHA should attempt to position itself to adopt ACGIH standards as "routine rulemaking"); Interview with John Martonik, supra note 43 (OSHA should require compliance with exposure limits indicated as safe in material safety data sheets provided to workers under Hazardous Communication Rule); Interview with Scott Railton, supra note 9 (Update of 1971 standards is "feasible through rulemaking.").

1. **Proof of Significant Risk**

The most efficient method for OSHA to update its 1971 standards would be to make a generic finding that workers were at significant risk in any workplace where they are exposed to chemicals in excess of levels that are considered safe under nongovernmental standards. In support of this finding, OSHA could cite the evidence used by those who established the nongovernmental standards and supply such additional information as the agency deemed necessary.[212] Since many of the nongovernmental standards are similar to NIOSH recommendations for exposure limits,[213] the NIOSH recommendations could also be cited where appropriate. Finally, OSHA would rely upon evidence submitted by the parties in the rulemaking proceeding.

OSHA utilized a similar method of risk assessment in promulgating its hazard communication rule. To indicate the degree of risk posed to workers by their lack of knowledge about the workplace dangers, OSHA relied on two governmental studies indicating that millions of workers were exposed to hazardous chemicals and on statements in the rulemaking record from employers, workers, academics and other professionals that workers would benefit from a hazard communication standard because they had little or no information about such dangers.[214] Based on that evidence, OSHA concluded that "a hazard communication standard is necessary to reduce significantly the risk of chemical-related disease which results from the current state of hazard communication practices."[215]

Whether this type of generalized finding is sufficient to establish significant risk depends on how the courts interpret the obligation to prove "significant risk" which was established by a a plurality of the Supreme Court in the Benzene case[216] and adopted by the Court in the Cotton Dust case.[217] The Benzene decision overturned a health standard which limited the benzene exposure of workers to 1 ppm because the agency failed to prove by "substantial evidence" that "it was more likely than not" that an exposure level less than 10 ppm was "necessary and appropriate to remedy a significant risk of material health impairment."[218] The plurality believed that OSHA had to "avoid risk assessment entirely by relying on a policy that makes attempts at quantitative estimation completely unnecessary."[219] OSHA had made a policy judgment that when scientists were unable to calculate an absolutely safe level of exposure, the prudent course was to seek maximum feasible protection. The plurality objected to this policy on the ground that OSHA had the burden of proof under the act to justify any regulation, that OSHA's policy judgment did not meet that burden, and that OSHA did not have any evidence that benzene posed a significant risk below levels of 10 ppm.[220]

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[212] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 11 (consensus standards based on risk evaluation by industrial and governmental hygienists and toxicologists).

[213] See PREVENTING INJURY, supra note 4, at 257-261, 377-380; Regulatory Reform & OSHA, supra note 13, at 441-42.

[214] 48 Fed. Reg. 53,282-83. The two studies were the National Occupational Hazards Survey conducted by NIOSH, which indicated that 25 million workers are exposed to one or more of the 8,000 workplace hazards identified by NIOSH, and Bureau of Labor Statistics, which indicated that 174,000 occupational illnesses were reported in 1977 and 1978. Id. at 53,282.

[215] Id. at 53,283.

The plurality's analysis does not prevent the use of a general or generic risk assessment. The Justices were clear that when OSHA attempted to quantify a risk, which it did not do for benzene, it had considerable freedom to design an appropriate methodology.[221] Justice Powell, who concurred in the decision, said he did not "rule out the possibility that the necessary findings [to support a health standard] could rest in part on generic policies properly adopted by OSHA . . . ."[222]

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[216] 448 U.S. 607 (1980).

[217] See American Textile Mfgs. Inst. v. Donovan, 452 U.S. 490, 505 n.25 (1981).

[218] 448 U.S. at 639-40.

[219] B. MINTZ, supra note 106, at 283.

[220] Id. at 652-53. Three Justices rejected OSHA's position that since expert scientific opinion demonstrated that no safe level could be determined, the only prudent course was to seek the lowest exposure level that was feasible. 448 U.S. at 631-32, 635 n.38. The fourth member of the plurality, Justice Powell, said that he was would have accepted expert scientific opinion as proof of "significant risk" if OSHA had first proven that quantifiable evidence was unavailable. Id. at 667.

Other Supreme Court authority provides indirect support for OSHA's use of generic risk assessment. In Chemical Manufacturers Assoc. v. Natural Resources Defense Council, the Court indicated it would apply a deferential scope of review when an agency interprets its enabling act and that it would overrule the agency only if "Congress has clearly expressed an intent contrary to that of the agency."[223] This holding is consistent with the Benzene case. The plurality in Benzene concluded that OSHA's policy judgment to seek maximum feasible protection was an attempt to avoid the burden of proof which Congress had clearly established for OSHA.[224] Since no similar legislative prohibition exists against the use of generic risk assessment, OSHA should be able to use this approach to update the Table Z consensus standards.

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[221] The plurality said it did not intend to "strip [OSHA] of its ability to regulate carcinogens" and it did not intend for "the Agency to wait for deaths to occur before taking any action." 448 U.S. at 655. It recognized that the significant risk requirement was not a "mathematical straitjacket" and that a determination of what was significant would be "based largely on policy considerations." Id. at 655-56 n.62. The plurality also said that OSHA need not support its finding with "anything approaching scientific certainty" and that it can use "conservative assumptions" in interpreting data, "risking error on the side of overprotection rather than underprotection." Id. at 656. Finally, with regard to benzene, the plurality admitted that a "precise correlation between exposure levels and cancer risks may never be possible," but they believed that quantifiable data would be "at least helpful" in performing risk assessments." Id. at 657 n.64.

Based on the previous comments, Professor Mintz believes that OSHA has "considerable flexibility in performing risk assessments and determining that a risk [is] significant" and that the only important limitation imposed on OSHA is that it cannot "avoid risk assessment entirely by relying on a policy that makes attempts at quantitative estimation completely unnecessary." B. MINTZ, supra note 106, at 283. Professor Mintz's prediction seems to be borne out by the judicial deference accorded OSHA after the Benzene case in the circuit courts. See, e.g., ASARCO v. OSHA, 746 F.2d 483, 490-95 (9th Cir. 1984) (OSHA had substantial evidence that arsenic expose posed a significant risk); United Steel Workers of America v. Marshall, 647 F.2d 1189, 1248 (D.C. Cir. 1980) (OSHA had substantial evidence that lead exposure posed a "significant risk").

At least one attorney for regulated industries disagrees with this analysis. According to Neil King, "[t]he agency can't simply say that there is a 'significant risk' just because a private standard setting agency suggested it." Interview with Neil King, supra note 53.

[222] 448 U.S. at 665.

In Weinberger v. Hynson, Westcott & Dunning, Inc.,[225] the Court demonstrated its tolerance for a generic approach. Although FDA is required by statute to hold a hearing before it withdraws its approval to market a drug,[226] it made a generic determination not to do so for drugs for which no reliable scientific evidence of efficacy existed. FDA had been advised by the National Research Council of the National Academic of Sciences (NAS-NRC) that nearly 3,700 such drugs were on the market.[227] The Court held that FDA could use a summary judgment procedure to deny a hearing because "[i]f FDA were required automatically to hold a hearing for each product whose efficacy had been questioned by the NAS-NRC study . . . we have no doubt that it could not fulfill its statutory mandate to remove from the market all those drugs which do not meet the effectiveness requirements of the Act."[228]

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[223] 105 S. Ct. 1102, 1108 (1985). The Court upheld EPA's interpretation of the Clean Air Water Act concerning its authority to grant variances, stating that "the agency charged with administering the statute is entitled to considered deference; and that to sustain it, we need [only find] that EPA's understanding of this 'complex statute' is a sufficiently rational one." Id.

[224] See supra notes 218-19 and accompanying text.

[225] 412 U.S. 609 (1973).

[226] 21 U.S.C. § 355(3) (1982).

[227] When Congress amended the FDCA in 1962, it required FDA to withdraw from the market any of the 4,000 drugs licensed before 1962 unless a manufacturer had proven their efficacy by at least two "adequate and well-controlled investigations," which are studies that involve the use of formal experimental controls to establish the statistical reliability of the observations. 21 U.S.C. §355(d) (1982). FDA hired the National Research Council of the National Academy of Sciences (NAS-NRC) to conduct an initial review of the drugs and the NAS-NRC found that only 434 of them were efficacious. No "adequate and well-controlled investigations" existed to prove the efficacy of the others.

OSHA's current posture is very similar to that of FDA in the late 1960s. Like FDA, OSHA seeks to take action based on the advice of an independent scientific body, it will be able to act effectively only if it can use an innovative procedure that will avoid case-by-case determinations, and its enabling act can be construed to permit such a process. In these circumstances, Hynson, Westcott and Dunning would require the Court to defer to OSHA's interpretation that it has the authority to use a generic risk assessment.

2. Proof of Economic and Technological Feasibility

The previous authorities also support a generic approach to establish the technological and economic feasibility of updated consensus standards.[229] It is not, however, as apparent that OSHA may rely on the information compiled by those who recommended the nongovernmental standards for its feasibility determination. Since these standards address only exposure limitations, they contain little information about economic and technological feasibility. If OSHA would be required to develop its own data to support feasibility of updating the 1971 standards, the generic effort could be considerably slowed.

OSHA might be able to meet its burden of proof without a full-fledged investigation of feasibility if it could point to instances of industry compliance with nongovernmental recommendations as evidence of feasibility.[230] Further, in its notice of rulemaking, the agency could ask for comments concerning feasibility. After that step, specific objections could be analyzed and resolved based on information contained in those submissions. Finally, OSHA could resolve any remaining feasibility problems through a system of variances.[231]

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[228] 412 U.S. at 621.

[229] M. ROTHSTEIN, supra note 200, at §§ 73-74. A standard is technologically feasible when OSHA establishes "modern technology has at least conceived some industrial strategies or devices which are likely to be capable of meeting the PEL and which the industries are generally capable of adopting." Thus, OSHA must demonstrate a "general presumption of feasibility." United Steelworkers v. Marshall, 647 F.2d 1189, 1266, 1269 (D.C. Cir. 1980), cert. denied sub nom. Lead Industries Assoc. v. Donovan, 453 U.S. 913 (1981); accord ASARCO, Inc. v. OSHA, 746 F.2d 483, 495-96 (9th Cir. 1984). Id. at 1269. A standard is economically feasible when it is "'capable of being done, executed or effected.'" American Textile Mfgs. Inst. v. Donovan, 452 U.S. 490, 508-509 (1981). Thus, a standard is not economically infeasible simply because it is financially burdensome or even because it threatens the survival of some companies in the industry. United Steelworkers, supra, at 1265; ASARCO, supra, at 499.

This strategy for avoiding full-fledged individualized investigations, however, presents three problems. First, it could be used only for industry recommendations for which evidence of compliance exists. Second, if the nongovernmental standards do take feasibility into account de facto, they may well reflect the practices of the laggards in the industry. In such cases, they may not be sufficiently stringent to warrant the generic effort. Finally, OSHA would still have to engage in a feasibility analysis for purposes of OMB review.[232] Unless OMB would accept the agency's truncated analysis, OSHA would have to engage in a case-by-case feasibility analysis anyway, thereby sacrificing the time and resource savings of the generic approach.

In sum, although a generic update of the 1971 standards is feasible, it is not without drawbacks. OSHA may have to litigate whether it can make a generic risk assessment for all of the workplaces being regulated. In addition, OSHA would have to present at least some feasibility data for each affected industry. If OSHA could not easily obtain this information, updating the 1971 standards could take a considerable amount of time.

C. Implementation Through the MSDS

Another possible approach to updating Table Z is to fold the process into OSHA's hazard communication rule. This rule requires employers to furnish employees with a "Material Safety Data Sheet (MSDS) for "hazardous" chemicals that specifies, among other safety information, whether there are any recommended exposure limitations. A chemical is "hazardous" when an authoritative scientific or governmental body, or a reliable scientific study, has found it to be a confirmed or suspected carcinogen, or when it is otherwise dangerous to employees.[233] If OSHA promulgated a health standard that required employers to comply with the exposure limitations specified in an MSDS, unless OSHA had promulgated a more stringent limitation, the agency would have a method of automatically updating such exposure limitations. As chemical manufactuers changed the exposure limitations in an MSDS to reflect changes in scientific information, employers would be automatically required to meet any new exposure limitation contained in the MSDS.[234] The MSDS is written by the manufacturer of the chemical and it is required to update any information as necessary.

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[230] See Viscusi, supra note 79, at 474 (consensus standards are sometimes based on industry practices).

[231] See M. ROTHSTEIN, supra note 200, at §§81-82 (OSHA has authority to grant temporary and permanent variances from standards).

[232] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at 2.

OSHA, however, could not enforce the exposures levels indicated in the MSDS without a sufficient showing that its regulation was justified. Unless OSHA made such a showing, employers would be required to meet legal obligations that were established by a private group, were not reviewed by OSHA, and were imposed without a prior hearing. Such a complete delegation of legislative power to private parties would likely be unconstitutional.[235] Even if not unconstitutional, the courts would probably find that such an ambitious strategy exceeded OSHA's statute, which requires "significant risk" and feasibility findings, or that it constituted arbitrary and capricious agency action.

Adoption of the MSDS exposure limitations by rulemaking has the same disadvantages as adoption of the ACGIH recommendations, and two other ones. First, the allowable exposure level for any given chemical will probably be less stringent than if OSHA promulgated its own standard for that chemical. Second, the standards which are chosen may be more speculative than a comparable government standard.[236] Third, unless OSHA could make a generic risk assessment and avoid a full-fledged feasibility analysis for each chemical, this idea would be of little benefit over OSHA's traditional methods of regulation. Fourth, it may be more difficult to adopt the MSDS limitations than the ACGIH limitations. If OSHA adopted the ACGIH recommendations, it could support a "significant risk" finding with the information on which the ACGIH relied. Moreover, in many cases, NIOSH has also published data that supports the ACGIH recommendation. Since OSHA would not have these sources of information for any exposure limitation in an MSDS, it would have to develop some type of data to support its finding. As discussed in the last section, the *Benzene* case requires OSHA to have at least some data to support a finding of significant risk. OSHA might be able to obtain whatever supporting data the manufacturer used to determine the exposure limitation in the MSDS, but it is not clear how easily OSHA can obtain such information or whether it would be sufficient evidence. Moreover, it is not uncommon for different manufacturers to specify different exposure levels for the same chemical on their MSDSs. Finally, adoption of the MSDS limitations may duplicate what could be accomplished by adoption of the ACGIH limitations. Chemical manufacturers are likely to rely on information from ACGIH to specify an exposure limitation in the MSDS. Although MSDSs address a larger universe of chemicals than the ACGIH voluntary exposure levels, it is not clear that the advantages of this proposal significantly exceed the advantages of adopting the ACGIH recommendations.

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[233] 48 Fed. Reg. 53,280, 53,343-44 (1983) (codified at 29 C.F.R. §1910.1200 (1986)); see Responses to Occupational Disease, supra note 10, at 1264-65 (description of MSDS requirements).

[234] 48 Fed. Reg. 53,280, 53,343-44 (1983) (codified at 29 C.F.R. § 1910.1200 (1986)); see Responses to Occupational Disease, supra note 10, at 1264-65 (description of MSDS requirements).

[235] See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (federal statute invalidated on the ground it constituted the delegation of legislative power to private parties.); see also Jaffe, supra note 208.

D. Implementation Through General Duty Clause

The Occupational Safety and Health Act imposes upon employers a "general duty" to provide a "place of employment free from recognized hazards that are causing or are likely to cause death or serious harm . . . ."[237] OSHA could take the position that compliance with the ACGIH or MSDS limitations was a "general duty" of every employer. The legal and practical consequences of this approach, however, require careful scrutiny.

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[236] The chemical manufacturer will probably use exposure limitations published by authoritative governmental bodies, such as NIOSH, or nongovernmental bodies, such as ACGIH, if they are available. Since the ACGIH recommendations are voluntary, they are set on a more speculative basis than OSHA regulations. *See supra* note 202-03 & accompanying text (ACGIH standards are speculative). The manufacturer, however, should have some incentive to seek out reliable estimates. If it understates the appropriate exposure limitation, it may be liable in tort to any workers who become ill as a result. If it overstates the appropriate limitation, it may find that its customers will turn to other chemicals, if substitutes are available, because they are understood to be safer. How effective these incentives might be is unknown, but they do suggest that manufacturers are not completely free to ignore their obligations to specify an accurate exposure limitation.

1. **Legal Issues**

Use of the general duty clause to enforce nongovernmental standards would not be an unconstitutional delegation of power to private parties, because OSHA's actions under the general duty clause are reviewed by the independent Occupational Safety and Health Review Commission (OSHRC) and, if necessary, by the federal courts. Since OSHA would bear the burden of proving that a violation of the general duty clause had occurred,[238] there would be no delegation of legislative power to a private group.

This innovative use of the general duty clause, however must also be authorized by Congress. To prove a violation of the general duty clause, OSHA must establish "'(1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard.'"[239] Some courts require that OSHA establish the third element -- that the hazard was or could cause serious injury -- by proving it presents a "significant risk," but other courts require proof only of possible harm.[240] Under those requirements, an employer arguably has a duty to conform to nongovernmental recommendations concerning ambient exposure levels, because employers that do not conform fail to render their workplaces free of hazards that are recognized and that can cause serious death or injury.[241]

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[237] 29 U.S.C. at §654((a)(1).

[238] See notes 471-85 infra & accompanying text (description of the system of review for alleged violations of the general duty clause).

[239] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. General Dynamics Land Systems Division, 815 F.2d 1570 (D.C. Cir. 1987), citing Con Agra, Inc., McMillan Co. Division, 1983-84 O.S.H. Dec. (CCH) ¶26,420, at 33,523 (1983).

[240] Compare Pratt & Whitney Aircraft v. Secretary of Labor, 649, F.2d 96, 104 (2d Cir. 1981) (hazard must present a "significant risk"); Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317 (5th Cir. 1984), rehearing denied 738 F.2d 437 (5th Cir. 1984); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973) (test is whether practice "could eventuate in serious harm" and agency determination should be accorded "deference.")

American Smelting & Refining Co v. OSHRC offers some support for this position.[242] Prior to OSHA's promulgation of a comprehensive standard for worker exposure to lead, American Smelting was charged with a violation of the general duty clause for exposing workers to concentrations of lead in excess of those generally recognized as safe by the industry. The Eight Circuit upheld the citation on the ground that the generally recognized limitation had been a "nationally recognized standard of safety for years" and that "this is not a situation in which a new danger is involved and in which there is any serious debate on a national standard of industrial health."[243] The court, however, was careful to qualify its holding. It noted that Chairman Moran of the OSHRC, who had dissented from the Commission's approval of the citation, had argued:

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[241] An employer who did not meet the privately established exposure level has failed to "render a workplace free of a hazard" as long as conformance with the exposure level is "capable of achievement." See National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973); see generally M. ROTHSTEIN, supra note 200, at §146 (statutory requirement of "free of hazards" means elimination of hazard is "capable of achievement.") Non-conformance with the exposure level would be a "recognized" hazard as long as the employer's industry recognized the exposure level as setting a standard of safety. See National Realty & Construction Co v. OSHRC, supra, at 1265 n.32 (D.C. Cir. 1973) (requirement of "recognized hazard" is determined by "common knowledge of safety experts who are familiar with the circumstances of the industry . . . ."); see generally M. ROTHSTEIN, supra, at §145 (requirement of "recognized hazard" can be proven by "industry recognition" of problem as a hazard); see also American Smelting & Refining Co. v. OSHRC, 501 F.2d 504, 510 (8th Cir. 1974) (requirement of "recognized hazard" extends to hazards only detectable through instrumentation). In the past, private standards have been used to demonstrate that a hazard was recognized by the employer's industry. See, e.g., Usery v. Marquette Cement Manufacturing Co. v. OSHRC, 568 F.2d 902 (1977) (industry safety standard prohibited practice in question); see M. ROTHSTEIN, supra, §145, at 166. Finally, non-conformance with the exposure level would be a "cause" of death or injury as long as there was sufficient proof that exposures below the exposure level were sufficiently dangerous. See supra note 240 and accompanying text (OSHA must provide significant risk or possible harm).

[242] 501 F.2d 504 (8th Cir. 1974).

[243] Id. at 512.

> [T]he Secretary's use of the general duty clause renders the variance procedure unavailing, allows little advance warning to the employer of what the Government considers a safe and healthful working place, renders the use of the temporary emergency standards provision a nullity, and extends the general duty clause beyond its limited purpose for coping with hazards that are obvious and admitted by all concerned and for which no specific standard has been promulgated.[244]

The court replied

> Generally, Chairman Moran's analysis is sound. The act does focus on the promulgation of specific standards and an elaborate procedure involving all parties in fairly arriving at those standards. . . . The use of the general duty clause ordinarily should not be available when a specific standard has been promulgated. . . . Yet we think that the general duty clause should be available at least under the facts of this case in which a specific standard was under review and in which the Petitioner was allegedly violating a health standard that had been recognized nationally for many years.[245]

Since American Smelting, OSHA and most courts have taken the position the general duty clause is not applicable to an employer when OSHA has a specific standard covering the hazard involved.[246] United Automobile, Aerospace and Agriculture Implement Workers of America v. General Dynamics Land Systems Division, however, recently held that specific health and safety standards do not always preempt an employers general duty to provide a safe work environment.[247] Although General Dynamics had obeyed an OSHA standard governing worker exposure to freon and had apprised employees of the proper procedures to follow, one worker died and others were injured from exposure to the chemical. The court rejected General Dynamic's contention that its compliance with the OSHA standard pre-empted the agency from charging it with a violation of the general duty clause. It held:

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[244] Id. at 511.

[245] Id. at 512. At the time of the citation issued to American Smelting, OSHA was reviewing the adoption of a consensus standard for lead. The consensus standard which was adopted was identical to the exposure standard enforced by the court. Compare id. at 507 (industry recognizes an exposure limit of $.2mg/m^3$) with United Steelworkers of America v. Marshall, 647 F.2d 1189, 1204 (D.C. Cir. 1980) (OSHA had 1971 standard of 200 $ug./m^3$).

> If (as is alleged in this case) an employer knows that a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under [the general duty clause] to take whatever

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[246] 29 C.F.R. §1910.5(f) (1986); L.R. Wilson and Sons, Inc. v. OSHRC, 698 F.2d 507, 511 (D.C. Cir. 1983) ("'A general standard is not preempted unless a specific standard sets forth the measure that an employer must take to protect employees from a particular hazard.'"); see also National Realty and Construction Company v. OSHRC, 489 F.2d 1257, 1261 n.9 ("Specific, promulgated standards preempt the general duty clause, but only with respect to hazards expressly covered by the specific standard.") (D.C. Cir. 1973). OSHA's interpretation is based on a statement in the report of the Senate Labor and Public Works Committee that the general duty requirement was designed to protect employees "who are working under special circumstances for which no standard has yet been adopted." SENATE COMM. ON LABOR AND PUBLIC WELFARE, S. Rep. No. 1282, 91st Cong., 2d Sess. 9-10 (1970).

[247] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. General Dynamics Land Systems Division, 815 F.2d 1570 (D.C. Cir. 1987).

> measures may be required by the Act over and above those mandated by the safety standard.[248]

If employers have a general duty to comply with nongovernmental ambient exposure limitations, their duty would not be automatically pre-empted because OSHA's Table Z standard covering the same hazard was less strict. Hence, the fact that OSHA's 1971 standards remain on the books may not preclude it from deciding that the general duty clause requires employers to comply with current ACGIH recommendations. OSHA could, in any event, obtain the same result by repealing the 1971 standards.

Whether employers have a general duty to comply with nongovernmental standards is a hotly disputed issue. Industry lawyers argue that Congress intended the general duty clause to be used only for the rare case when some unique health or safety problem is not covered by a standard promulgated by OSHA.[249] They object that use of the general duty clause to enforce nongovernmental exposure limitations would subject employers to financial penalities without the prior warning that a promulgated standard provides, would deny affected parties a full opportunity to comment on the complex scientific and policy questions involved in setting ambient exposure limitations, and would place on a single employer the burden of challenging the legality of a standard.[250] A Senate Report offers some support for the industry position: "[t]he general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under specific circumstances for which no standard has yet been adopted."[251]

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[248] *Id.* at 1577. The court determined that OSHA's regulation, 29 C.F.R. §1910.5(f), which provides that health or safety standards prevail over compliance with the general duty clause, was not inconsistent with its holding. The Court interpreted the regulation "merely to prohibit a double penality for an employer who has violated a safety standard; that is to say, one penalty under the safety standard and the other under the general duty clause." *Id.* at 1576.

[249] 1981 Oversight Hearings, *supra* note 12, at 1578 (Statement of Robert Thompson, U.S. Chamber of Commerce) (OSHA overuses general duty clause); *See* Interview with Scott Railton, *supra* note 9 (industry "adamant" that general duty clause can not be used to enforce nongovernmental standards); Interview with Bob Gombar, *supra* note 23 (Oct. 30, 1986) (industry opposes OSHA's misuse of general duty clause to take the place of regulation by standards). In the past, OSHA attempts to expand the coverage of the general duty clause have met with vigorous opposition. *See* B. MINTZ, *supra* note 106, at 456-460.

[250] *See, e.g.*, Memorandum from Synthetic Organic Chemical Mfgs. Assoc. to OSHA, *reprinted in* B. MINTZ, *supra* note 106, at 458-59.

While worthy of serious consideration, the industry position may not prevail. Enforcement of nongovernmental standards through the general duty clause could also be interpreted as being consistent with the Senate report. It would not be "a general substitute for reliance on standards," but rather an interim measure until OSHA determines in individual proceedings whether more stringent standards are necessary. This approach therefore would "simply enable the Secretary to insure the protection of employees who are working under specific circumstances for which no standard has yet been adopted." Further, enforcement of nongovernmental standards, by whatever means, appears to be consistent with the structure of OSHA's enabling legislation.[252] Since OSHA's interpretation of its statutory authority is entitled to deference,[253] and since OSHA's choice to enforce nongovernmental standards through adjudication, rather than rulemaking, is also entitled to deference[254] OSHA may be able to establish its authority to proceed in this manner. OSHA could defuse the force of some of the industry objections by promulgating an interpretive rule indicating that OSHA intended to enforce nongovernmental standards through the general duty clause and allowing comments on the merits of this approach.

2. **Practical Issues**

Although OSHA may have the legal authority to enforce the nongovernmental standards through the general duty clause, it may not wish to proceed in that manner. The burden of litigating these standards on a case-by-case basis may not be substantially less than the burden of promulgating individual standards through rulemaking. Employers are entitled to contest citations for violation of the clause before an administrative law judge of OSHRC, and if the employer loses, the case may be heard by the full Commission.[255] Further, the employer may appeal any adverse decision of the Commission to an appropriate federal circuit court.[256]

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[251] S. Rep. No. 1282, 91st Cong., 2d Sess. 9-10 (1970), reprinted in B. MINTZ, supra note 106, at 436-37.

[252] See supra note 190 and accompanying text.

[253] See Chemical Manufacturers Assoc. v. Natural Resources Council, Inc., 105 S. Ct. 1102 (1985); see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984).

[254] See National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974).

Enforcement of nongovernmental standards through the general duty clause may be burdensome for another reason. OSHA will not only have to litigate on a case-by-case basis, but it probably will receive a hostile reception from OSHRC. OSHA administrators and union officials generally believe OSHRC has been hostile to their efforts to expand their regulatory authority.[257] Although that charge is hard to verify,[258] a recent case suggests that OSHRC will have little sympathy for OSHA's ambitious use of the general duty clause to enforce Table Z standards.

Kastalon, Inc. considered OSHA's citation of two employers for a violation of the general duty clause for exposing workers to MOCA (4,4'-Methylene bis (2 chloronaniline)).[259] Although expert witnesses for OSHA and the companies agreed that MOCA was a suspected carcinogen,[260] the Commission dismissed the citations because OSHA had failed to prove that MOCA created a significant risk.[261]

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[255] 29 U.S.C. at §§659, 661; The primary difference is that much more attorney time and somewhat less scientist time is expended in general duty clause cases. Gordon Interview, supra note 38.

[256] 29 U.S.C. at §660(a).

[257] See, e.g., Interview with Barry White, supra note 15 (OSHA loses most of its cases before the OSHRC).

[258] Neither OSHRC nor OSHA keeps relevant statistics. The AFL-CIO reported in 1984 that Commissioner Robert Rowland voted to uphold OSHA citations only 16 percent of the time compared to a 63 percent average for the other Commissioners. Washington Post, August 30, 1984, at A25. The average rate of affirmance by the other Commissioners is consistent with the rate of earlier members of the Commissioner. In a study of the period 1973 to 1978, Professor Rothstein found that the Commission affirmed 65.5% of the violations charged by OSHA. This rate of affirmance was similar to that of the ALJs at OSHRC (64.2%) and the Courts of Appeal (67.4%). Rothstein, Judicial Review of Decisions of the Occupational Safety and Health Commission -- 1973-1978: An Empirical Study, 56 CHI KENT L. REV. 607, 631 (1980).

[259] 1986 O.S.H. Dec. (CCH) ¶27,643, at 35,970 (July 23, 1986); appeal filed No. 86-2527 (7th Cir. Sept. 9, 1986).

[260] Id. at 35,974.

OSHA had argued that the concept of "significant risk" was subsumed in its burden of proof under the general duty clause to prove a hazard was "recognized." OSHA argued that the recognition requirement "'encompasses notions of what workplace conditions reasonably prudent persons believe should be guarded against,' and thus assures that conditions that do not present a significant risk would not be subject to a [general duty]."[262] The Commission disagreed because "[t]he mere fact that employers take certain precautions does not prove that those precautions are required by an occupational safety or health standard or by the general duty clause." It noted that the courts have consistently held it would be inappropriate to base a finding that a hazard exists solely on evidence that an employer has taken certain precautions.[263]

This holding suggests that OSHA could not meet its burden of proof in a general duty case by showing that workers were exposed to a chemical in excess of an ACGIH or MSDS ambient exposure limitation. According to the Commission's logic, the existence of a nongovernmental recommendation would prove only that a hazard was recognized, but not that it presented a significant risk. The Commission noted that "[e]mployers may decide to limit the exposure of their employees to chemicals of unknown toxicity or take take other precautions against injury or illness out of an abundance of caution rather than a belief that the absence of such precautions would exposure employees to a significant risk of harm.[264]

OSHA had also attempted to prove significant risk by the testimony of an expert in chemical carcinogenesis, who performed a quantitative risk assessment of MOCA based on animal studies of it. The Commission rejected this evidence because an expert for the employers testified that OSHA's expert had made erroneous assumptions in his analysis and that quantitative estimates of risk to humans can not be made with any reasonable degree of scientific certainty from animal studies.[265]

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[261] *Id.* at 35.975. The Commission noted that some courts do not require OSHA to prove significant risk as part of its burden of proof under the general duty clause. *Id*; *see supra* notes 240 & accompanying text (discussion of general duty clause and significant risk test). But the Commission reiterated its contrary view that such evidence was necessary. 1986 O.S.H. Dec. (CCH) ¶27, 643, at 35,975.

[262] *Id.* at 35,975.

[263] *Id.*

[264] *Id.* at 35,975.

Finally, the Commission voiced its belief that Congress intended OSHA to promulgate health standards to enforce ambient exposure standards, that OSHA was attempting to use the general duty clause to avoid promulgating a rule, and that OSHA's actions under the general duty clause did not "promote the goals of 'fairness and mature consideration' that the Act's rulemaking provisions were designed to foster." The Commission pointed out that OSHA had attempted to promulgate a health standard for MOCA, but that when that effort failed, the agency turned to the general duty clause to establish an exposure limitation.[266] The Commission, however, did not determine whether the general duty clause could be used for this purpose because OSHA had failed to prove that MOCA presented a significant risk.

This decision indicates that OSHRC will likely hold that OSHA does not have the authority to enforce nongovernmental standards by use of the general duty clause and, if OSHA has such authority, that no violation occurs when workers are exposed to a chemical in excess of such standards. Instead, OSHA will have to furnish test data that the chemical poses a significant risk, and animal data may not be sufficient for that purpose.

E. Conclusions

No foolproof method exists for updating the 1971 consensus standards by adopting the newest ACGIH recommendations. While both use of generic rulemaking or the general duty clause presents legal and practical problems, the rulemaking strategy is preferable. First, this method should allow OSHA to use a generic risk assessment. By comparison, OSHA would have to prove significant risk on a case-by-case basis under the general duty clause. Moreover, unless _Kastalan, Inc._ is overruled, OSHA may have considerable difficulty proving significant risk to the satisfaction of OSHRC. Second, OSHA can establish the legality of an update more quickly if it uses rulemaking. The challenge to any standard would proceed directly to a circuit court. If the general duty clause were used, OSHA would have to cite an employer for violation of a Table Z standard and litigate the case before OSHRC before judicial review could be undertaken.

If the courts affirm OSHA's authority to update the Table Z standards, the agency would have to devise a method for keeping its standards current with changes in scientific knowledge. It may be possible to adopt new ACGIH recommendations from time to time, but this solution will not work if OSHA's use of the ACGIH recommendations ultimately destroys the viability of that process.[267] Translation of the group's standards into binding norms would shift the political battleground from OSHA to ACGIH or other private standard setting groups. This shift could make it more difficult for ACGIH or another organization to reach agreement on future recommendations or it could cause them to weaken any recommendations in order to achieve consensus. In either case, OSHA may not be able to rely on the group for a future update of the Table Z standards.

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[265] _Id_. at 35,975-980.

[266] _Id_. at 35,972.

A better solution would be for OSHA to use some type of advisory committee to make recommendations for updating the Table Z standards. This would allow OSHA to obtain input from all interested parties, including ACGIH, and thereby to formulate true consensus standards. As discussed earlier, the ACGIH process does not include labor unions and other interested parties. OSHA, however, may not be able to form the type of committee it needs because of current legal limitations on its use of advisory committees. If these limitations can not be overcome, the agency could ask an organization like the National Academy of Sciences to undertake the responsibility.

Rulemaking may not be the best method to adopt the MSDS exposure limitations. If OSHA adopts the ACGIH recommendations, it can rely on the data used by that organization and on NIOSH data. Similar data, however, may not be readily available concerning the MSDS limitations. For that reason, the general duty clause may be a better means of implementation. Although OSHA would still have to justify the MSDS limitation before OSHRC, it might be able to gather the information on a case-by-case basis more easily. Moreover, since OSHA would enforce the latest recommendation contained in an MSDS, employers would be obligated to meet the newest exposure limitation specified by a chemical manufacturer. In this manner, exposure limitations would be automatically updated subject to OSHA's ability to justify them before OSHRC.

Another advantage of the general duty clause is that OSHA might be able to meet its burden of proving significant risk by showing that the MSDS exposure limitation was generally recognized as appropriate in the relevant industry. OSHA could most easily make such a showing when the limitation was based on an ACGIH recommendation. In Kastalon, Inc., OSHA argued that its obligation to prove significant risk was satisfied if it established that a hazard was generally recognized in an industry, and that the existence of a nongovernment exposure limitations constitute recognition by persons in an industry that that a chemical presents a significant risk at exposure levels above those recommended. OSHRC rejected this argument, and OSHA has appealed that result.

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[267] Interview with Dr. Imogene Sevin, supra note 42; Interview with Barry White, supra note 15.

A final determination of how to adopt the MSDS exposure limitations will have to await not only the outcome of Kastalon, Inc., but also the outcome to any challenge to adoption of the ACGIH limitations by rulemaking. After these cases are decided, OSHA could better decide whether it has the legal authority to adopt the MSDS limitations by either method.

VII. Implementation

A. A Regulatory Plan

To implement the previous recommendations, OSHA must match its methods of regulation to its regulatory priorities. This can be done through a regulatory implementation plan.

Our previous Report recommended that OSHA establish a priority list ranking the chemicals and safety hazards that it plans to consider for regulation.[268] Once OSHA has established this list, it can determine which of those hazards can be more effectively regulated by which of the techniques discussed previously.

The vehicle for this systematic consideration could be a "regulatory plan" setting out the agency's broad agenda for the foreseeable future. The regulatory plan would consist of the agency's preliminary determinations whether to adopt a generic or case-by-case approach, the extent to which it will pursue consensus approaches, and how performance or information solutions might complement traditional command solutions.

The most important aspect of the plan would be its examination of the possibility of generic approaches toward regulating hazards on the priority list. For example, if a generic standard for the petroleum industry would effectively regulate eighty percent of the uses of the chemicals ranked 3, 4 and 18 on the priorities list, the plan might require OSHA to consider initiating a generic proceeding immediately and forestall promulgating individual standards for chemicals 3 and 4. Similarly, the plan might call for initiating a multi-chemical proceeding with respect to similar chemicals ranked 2, 7, 15, and 25 on the list, even though the last two chemicals would otherwise not be taken up until the agency had completed individual proceedings with respect to higher priority chemicals.

The plan could also take an initial "cut" at whether a consensus approach would be in order. For example, if the agency lacks sufficient resources to convene a scientific advisory committee for every hazard on its priorities list, it could use the plan as a vehicle for designating those hazards for which advisory committees would be most useful and initiate the sometimes lengthy process of assembling experts before they are "co-opted" by one or another of the adversaries. Similarly, the plan could be a vehicle for identifying at an early stage potential candidates for negotiated rulemaking. For example, chemicals designated for multi-chemical generic rulemaking would not likely be primary candidates for regulatory negotiation, because of the possibility that numerous parties would have very different stakes in the outcome.

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[268] See REPORT ON RULEMAKING PROCEDURES, supra note 14, at IIC.

Finally, the agency could consider initially in the plan how it might use more innovative performance and information approaches to complement traditional standard setting techniques.[269] This aspect of the regulatory plan, however, will probably be less useful than the other two aspects, because performance and information options are more likely to arise later in the standard setting process when the agency has more information on the costs and benefits of several options and when the staffs of the policy office and the program office begin to interact on the teams suggested in our previous Report.[270]

Like the priorities list, the plan will have to be flexible to accommodate new information and shifting political pressure. Since the plan is meant to be a vehicle for incorporating innovative approaches into the agency's more traditional case-by-case, command-oriented standard setting process, the agency should not be afraid to suggest innovative strategies in the plan, even though the probability of failure may be somewhat higher. When an innovative approach fails, the agency must be prepared to amend the plan to focus in a more traditional way upon the hazards that the failed approach addressed.

Like the priority list, the plan should give the agency a firmer sense of the agency's near-term goals. It should in addition give the staff and the general public some sense of how the agency plans to go about meeting those goals. Finally, it should be the vehicle for matching the agency's resources with its priorities list. The plan would allow OSHA to optimize its use of limited resources by determining the extent to which more efficient techniques are available to address regulatory issues.

Finally, the proposed process should fold rather neatly into OSHA's existing program to comply with Executive Order 12398, which requires the agency to submit an annual report to OMB for its "Regulatory Program." In each report, OSHA organizes the hazards it intends to regulate by whether they are in the prerule, proposed rule, or final rule stage, and indicates for each hazard what problem is to be solved, why there is a need for a federal solution, what approach will be taken, and what rulemaking milestones (such as advanced notice of proposed rulemaking (ANPRM) or notice of proposed rulemaking (NPRM)) have occurred. In its evaluation of what approach will be taken, OSHA indicates the nature of the type of health or safety standard it anticipates. For example, OSHA indicated in its last report that it was reviewing data relating to three different permissible exposure limits for benzene and that performance requirements were being considered for implementing the proposed standard.[271]

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[269] See id. at Part III.

[270] Id.

OSHA's regulatory plan contains many of the elements recommended in the proposed regulatory plan. The proposed plan, however, asks OSHA to match more specifically its regulatory priorities with the methods by which those hazards would be regulated, with an emphasis on how the agency could increase its productivity. If OSHA is presently undertaking such an evaluation, we urge that it be expanded to consider the recommendations for alternative methods of regulation made here. If OSHA is not presently undertaking such an evaluation, we urge that its existing process be expanded to include these considerations. In any case, this type of process could easily become the basis of whatever information must be submitted to OMB.

> **RECOMMENDATION:** OSHA should adopt a regulatory plan which specifies how the agency intends to regulate the chemicals on its priority lists.

B. A Regulatory Planning Committee

The regulatory plan could be developed for the Assistant Secretary for Occupational Safety and Health either by the priority-setting committee recommended by our earlier report or by a specific committee appointed for that purpose. We previously recommended that OSHA establish a permanent prioritization committee of OSHA high level management staffers from at least the Deputy Director level and highly regarded health professionals from the agency's technical staff.[272] The principal advantage of assigning the planning responsibility to the prioritization committee is that it integrates the functions of setting priorities and planning how to accomplish them. The disadvantage is that its members may not have as much expertise in planning the methods of regulation as others in the agency. For example, the prioritization committee may not have representatives from the Solicitors office or the agency's budget office. To solve this problem, the membership of the prioritization committee could be augmented with other agency experts when it discussed the agency's regulatory plans. This solution, however, may make committee deliberations more difficult because of the committee's larger size.

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[271] REGULATORY PROGRAM OF THE UNITED STATES, *supra* note 32, at 306; *see generally id*. at 243-313 (OSHA's regulatory program for 1986-1987).

[272] *See id*. at Part IIC.

An alternative would be to assign this responsibility to a regulatory planning committee appointed for that purpose. It could be composed of high level management staffers from at least the Deputy Director level, a lawyer from the Solicitors office, and professionals from the Directorates of Health Standards, Safety Standards, and Policy.

The advantage of a separate committee would be its superior expertise and familiarity with high level agency policy. In addition, the burden of the planning process would be spread among more members of the agency. Although a separate committee might create the problem of coordination with the prioritization committee, that problem could be mitigated if one or two members of the regulatory planning committee were also members of the prioritization committee. Since all prioritization lists and regulatory plans would need to be approved by the Assistant Secretary, that office could also perform a coordination function. Therefore:

> **RECOMMENDATION:** OSHA should assign the initial responsibility to create and maintain a regulatory plan to a regulatory planning committee. Members should include high level management staffers from at least the Deputy Director level, a lawyer from the Solicitors office, and professionals from the Directorates of Health Standards, Safety Standards, and Policy. One or two of the members of this committee should also serve on the agency's prioritization committee to ensure coordination of these activities. Alternatively, the prioritization committee recommended earlier could be expanded to include planning functions.

If the committee is established in accordance with the above recommendation, its first task of drafting an initial plan will be quite burdensome and no doubt controversial. One possible device to aid the committee in this initial task would be to hold one or more public workshops that all committee members would attend and at which interested persons would be invited to comment on methods of regulation and their relationship to OSHA's priorities. As discussed in our earlier Report, this type of activity can build a consensus for the agency's decisions.[273]

The results of meetings of the regulatory planning committee should be made public after the Assistant Secretary has had an opportunity to review any proposed decisions of the committee. Because outside parties may have information important to the agency's plan, the committee should invite public comment on its work, and be open to changing the plan in light of the comments. The agency, however, should take the position that informal rulemaking procedures are not required, and it should resist strongly any judicial review of the plan. If the agency would have to litigate the value of the plan, or any amendment of it, the attendant delays could defeat the purpose of the entire exercise. We explained earlier that there is a sound legal basis for this position.[274]

> **RECOMMENDATION:** Prior to establishing an initial regulatory plan, OSHA should hold one or more public workshops at which interested persons are invited to comment on OSHA's regulatory plan. The results of meetings of the regulatory priorities committee should be made public after the Assistant Secretary has had an opportunity to review any proposed decisions of the committee. The Assistant Secretary should publish for public comment the proposed initial plan and, thereafter, any proposed modifications.

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[273] See id. at Part II.

[274] See id. at Part II C.

PART TWO: LEGISLATIVE REFORM

OSHA can implement reforms that should increase its productivity, but they have important limitations. In many situations, generic, performance, and information standards can not be effectively formulated or will not protect workers as effectively as OSHA's traditional methods of regulation. Negotiated rulemaking and advisory committees will not work for all, and perhaps many, of the problems that OSHA must address. The hearing process can be improved, but such steps are unlikely to decrease significantly the time it takes to promulgate a standard. Finally, OSHA can update the 1971 Table Z standards, but not without confronting a tangle of legal and practical problems. Comprehensive reforms can only come about through legislative change.

Congress should act not only because the potential for internal reform is limited, but because the current statute is the cause of many of OSHA's problems. Congress has given OSHA less flexibility than most other health and safety agencies, has failed to hold OSHA as accountable as other agencies, and has created organizational impediments that are unique to OSHA.

VIII. A More Flexible Mandate

Congress can create a more flexible mandate for OSHA in three ways. It can clarify the scope of judicial review; it can amend the substantive criteria for standard-setting to give OSHA more options; and it can more adequately oversee existing programs designed to produce testing information about chemicals.

A. Scope of Review

Under the Administrative Procedure Act (APA), the scope of review is "arbitrary and capricious" for informal rulemaking and of "substantial evidence" for formal rulemaking.[275] Congress has likewise adopted this arrangement for many health and safety programs, like the Clean Air and Clean Water Acts.[276] For OSHA and a few other programs, however, Congress has required the substantial evidence standard for informal rulemaking.[277]

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[275] 5 U.S.C. §§706(2)(A), (E) (1982).

[276] *See* 33 U.S.C. §1369(b) (1982) (Clean Water Act provides no standard of review to replace the APA); 42 U.S.C. §§7607(b), (d)(9) (1982) (Clean Air Act provides no standard of review to replace the APA).

This choice, which has been aptly described as an "anomaly,"[278] initially created considerable confusion, particularly concerning the degree of scrutiny required for judicial review of policy decisions.[279] Eventually, the courts held that OSHA's policy decisions were to be affirmed if it had

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[277] 29 U.S.C. at §655(f); see Note, Convergence Of The Substantial Evidence and Arbitrary And Capricious Standards of Review During Informal Rulemaking, 54 GEO. WASH. L. REV. 541, 542 n. 5 (1986) (list of agencies subject to substantial evidence scope of review for informal or hybrid rulemaking) [cited hereinafter as Convergence of the Standards].

[278] Industrial Union Department v. Hodgson, 499 F.2d 467, 469 (D.C. Cir. 1974) (". . . Congress -- with no apparent awareness of anomaly -- has explicitly combined an informal agency procedure with a standard or review traditionally conceived as suited to formal adjudication or rulemaking . . . ."). Judge McGowan explained why this pairing was a problem for the courts:

> From extensive and often conflicting evidence, the Secretary in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review that data in the record and determine whether it reflects substantial support for the Secretary's findings. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.
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> . . . [P]olicy choices of this sort are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions.

Id. at 474-75.

[279] See, e.g., id. at 473; Synthetic Organic Chemical Manufacturers Ass'n. v. Brennan, 503 F.2d 1155, 1158 (3rd Cir. 1974).

"adequate reasons" for them.[280] Since the Supreme Court has held that the "arbitrary and capricious" standard under the APA also requires an agency to express "adequate reasons" for a decision,[281] there is apparently no difference between the two standards as they apply to OSHA's policy conclusions.[282]

Despite the convergence of the two standards, a problem of appropriate judicial deference remains. Although the substantial evidence test requires judicial deference to agency decisions,[283] some courts are less deferential than they should be.[284] A decision by a panel of the Fourth Circuit, Forging Industry Ass'n. v. Secretary of Labor, indicates the nature of this problem.[285] The issue was the legality of OSHA's 1983 hearing conservation amendment which ordered employers to test employees exposed to loud noises and to prevent further hearing losses if they had been adversely affected.[286] The court, in a 2-1 decision, held that OSHA had exceeded its statutory authority, because employers were required to take preventative actions even if an employee suffered a hearing loss because of a non-occupational cause. Although the panel's decision was subsequently overuled by the Fourth Circuit sitting en banc,[287] it illustrates that courts sometimes fail to defer to the policy decisions of OSHA, and, even if corrected, that such decisions consume agency resources.

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[280] See, e.g., Texas Indep. Ginners Assn. v. Marshall, 630 F.2d 398, 404 (5th Cir. 1980); American Iron & Steel Institute v. OSHA, 577 825, 830-31 (3rd Cir. 1978), cert. dismissed 448 U.S. 917 (1980); Industrial Union Department v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

This interpretation, because it involves heightened scruntiny of the agency, satisfies any Congressional intent that the substantial evidence standard involves more rigorous review than merely determining whether the agency decision was "rational." Shapiro & Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and The Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L. REV. _____, _____ (forthcoming). The Supreme Court, however, now requires the same heightened scruntiny under the APA for the arbitrary and capricious standard of review. See infra notes 281 and accompanying text.

[281] Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

[282] See R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS §7.3.3 (describing arguable convergence of the two tests); Convergence of the Standards, supra note 277, at 557.

[283] See Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 457 (1983).

[284] See Ashford, Ryan & Caldart, Law and Science Policy In Federal Regulation of Formaldehyde, 222 SCIENCE 40, 45-46 (1983) (court that decided Gulf South Insulation v. Consumer Product Commission, 701 F.2d 1137 (5th Cir. 1983) "substituted its judgment for that of the agency" concerning whether formaldehyde is a human carcinogen); McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens at EPA and OSHA, 67 GEO. L.J. 729, 796 (1979) (courts fail to give agency policy decisions deference).

The exact basis of the panel's decision is obscure. Judge Sprouse's dissent understood the majority to have concluded that even if workers were likely to be injured on the job, OSHA could not act because a hearing loss could be aggravated by non-work related causes. As the dissent observed, this conclusion is not only illogical, it would prevent OSHA from regulating any hazard the health effects of which could be aggravated by other factors.[288] There are many negative physiological effects for which the precise cause cannot be determined, but which are known to be associated with occupational exposure.[289] This ruling of OSHA's statute would effectively emasculate the agency.

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[285] 748 F.2d 210 (4th Cir. 1984), rev'd 773 F.2d 1436 (4th Cir. 1985) (en banc).

[286] 748 F.2d at 212-213.

[287] Forging Industries Ass'n. v. Secretary of Labor, 773 F.2d 1436 (4th Cir. 1985) (en banc).

The majority, however, seemed to have a different concern. It apparently declared the amendment invalid on the ground that it required employers to take preventative measures for employees whose hearing losses had no occupational cause.[290] In reaching this result, the majority paid no attention to OSHA's justification for the amendment. OSHA made a specific finding that most hearing losses would be work-related.[291] More importantly, OSHA made a policy determination that even if an injury was not work-related, an employer should be required to take preventative actions, because of the high risk of further injury at the workplace. OSHA found that once a person suffers a hearing injury, the person is more susceptible to a hearing injury than others who have been exposed to loud noises without being injured. OSHA therefore required an employers to take preventative actions, because such a person is likely to suffer a further injury in a loud workplace.[292] Since the majority ignored OSHA's rational, it is clear they gave it no deference.

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[288] Judge Sprouse noted:

> Assuming, however, that some loss [caused outside of the workplace] also aggravates the hearing loss incurred by an individual employee in a high noise-producing industry, that is scant reason to characterize the primary risk factor as non-occupational. Breathing automobile exhaust and general air pollution for example, is not healing to a wounded lung. That hardly justifies the failure to regulate noxious workplace fumes that inflicted the primary wound. Nor would there be logic to characterizing regulation of the fumes as non-occupational because the condition inflicted is aggravated by outside irritants.

_Id_. at 216.

The majority's cramped interpretation can be compared to how the states treat hearing loss under workers compensation. Most states hold that noise-induced hearing loss is fully compensable as long as the claimant can prove that occupational exposures were at least a "contributing cause" of the hearing loss. M. ROTHSTEIN, _supra_ note 200, § 66, at 6 (1985 Pocket Part).

[289] _Responses to Occupational Disease_, _supra_ note 2, at 1236. An example is reproductive hazards, where most negative reproductive outcomes are of unknown origin even though certain workplace exposures have been proven to have adverse effects on reproduction. _See_ M. ROTHSTEIN, _supra_ note 200, §66, at 6 (1985 Pocket Part).

[290] The majority noted that "[i]t is obvious that hearing loss can result from non-occupational noise exposure _just as easily_ as it can from occupational exposure" and that "[a]irplanes, hunting rifles, loud music and a myriad of other sources produce noise potentially as damaging as any at the workplace." _Id_. at 214 (emphasis added).

Both the Administrative Conference and the Administrative Law Section of the American Bar Association have concluded that the current formulations of scope of review require clarification. The Administrative Conference has recommended that Congress should not utilize the "substantial evidence" standard for informal rulemaking."[293] The Administrative Law Section has adopted a "Restatement of Scope-of-Review Doctrine"[294] that improves on the APA and OSHA's enabling act, because it does not lump all of the scope of review functions under one standard of review. Instead, it lists the types of legal, policy, and factual conclusions made by agencies, and it indicates what scope of review is to be applied to each.[295]

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[291] 46 Fed. Reg. 4146 (1981) ("Since this amendment covers workers who are occupationally exposed to significant amounts of noise, the occupational loss can be expected to be the dominating component in most cases." Even though people may hunt or engage in noisy hobbies, most [injuries] will be work-related because the average person spends more time on a routine basis at work than in recreational activities.")

[292] _Id_. at 4152.

[293] Preenforcement Judicial Review of Rules of General Applicability (Recommendation 74-4), 1 C.F.R. §305.74-4, at 84 (1987).

[294] 38 AD. L. REV. 235-237 (1986). The Restatement is based on a report written by Professor Ronald Levin. _See_ Levin, _Scope of Review Doctrine Restated: An Administrative Law Section Report_, 38 AD. L. REV. 239 (1986). Preliminary drafts of the report were widely circulated with the Section of Administrative Law and the broader administrative law community, including members of the Administrative Conference. _Id_. at 239.

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[295] Restatement of the Scope-of-Review Doctrine, supra note 294, at 242-290. The Restatement provides:

> . . . .
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> (b) Grounds for Reversal. The court shall set aside an agency action if it finds that --
>
> (1) The action exceeds the authority granted by, or violates limitations imposed by --
>
> (A) The Constitution;
> (B) a federal statute;
> (C) an agency rule having the force of law;
> (D) federal common law;
> (E) any other source of law that is binding upon the agency.
>
> (2) The agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under, any of the sources of of law listed in subsection (b)(1).
>
> (3) The action rests upon a policy judgment that is so unacceptable as to render the action arbitrary.
>
> (4) The action rests upon reasoning that is so illogical as to render the action arbitrary.
>
> (5) The asserted or necessary factual premises of the action do not withstand scrutiny under the standards stated in section (g).
>
> (6) The action is, without good reason, inconsistent with prior agency policies or precedents.
>
> (7) The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action.
>
> (8) The action fails in other respects to rest upon reasoned decisionmaking.
>
> . . . .
>
> (f) Standards of Review: Issues of Law. The court is the primary authority on the issues presented by subsections (b)(1) and (b)(2), but it shall give appropriate weight to an agency's views concerning those issues. In determining whether and to what extent an agency interpretation deserves

Agency "policy judgments" are subject to an standard of "arbitrariness"; the factual premises upon which they are based are subject to a standard of "substantial support in the administrative record viewed as a whole."[296]

Existing scope of review statutes confuse unwary judges and invite judicial overreaching. Since clarifying legislation may mitigate those tendencies, Congress should amend OSHA's enabling act, or even better, the APA, based on the ABA's Restatement of the Scope of Review Doctrine. In either case, Congress should express its dissatisfaction with cases like Forging Industry that give very little deference to agency policy judgments and attempt to substitute the opinions of the judges for the policy judgment of the agencies who were delegated policymaking functions.

> **RECOMMENDATION:** Congress should amend the standard of judicial review for OSHA based on the Restatement of the Scope of Review Doctrine by the Administrative Law Section of the American Bar Association. Agency "policy judgments" would be

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> weight, the court shall be guided by such factors as the timing and consistency of the agency's position and the nature of the agency's expertise.
>
> (g) Standards of Review: Issues of Fact. Whether there is adequate support for an agency's factual finding or premise shall be determined as follows:
>
> (1) If the action resulted from a proceeding subject to 5 U.S.C. §§ 556, 557 or otherwise reviewed on the record of an agency hearing provided by statute, the court shall determine whether the finding is supported by substantial evidence in the record as a whole.
>
> (2) If the action resulted from a proceeding in which a statute or the Constitution requires that the facts shall be subject to trial do novo, the court shall independently determine whether the action is warranted by the facts.
>
> (3) In any other case:
>
> (A) The court shall determine whether the factual premise has substantial support in the administrative record viewed as a whole . . . .

Id.

[296] Id. The traditional standard of substantial evidence is applied to formal rulemaking and adjudication. Id.

> subject to a standard of "arbitrariness;" the factual premises on which they are based would be subject to a standard of "substantial support in the administrative record as a whole." This action could be taken specifically for OSHA or as part of a general reformulation of the scope of review indicated in the APA.

B. Legal Mandate

Another beneficial change would be to change the substantive criteria governing OSHA standard-setting to more closely resemble those of other health and safety agencies. Perhaps the greatest impediment to effective regulation of health hazards in the workplace is the fact that OSHA bears the substantial burdens of proving that a hazard poses a significant risk[297] and that harm from the hazard is reduced to the point of technological feasibility.[298] By comparison, Congress has established more flexible mandates in the Federal Water Pollution Control Act (FWPCA),[299] the Clean Air Act (CAA),[300] and the 1976 Medical Devices Amendments to the Food, Drug, and Cosmetic Act (MDA).[301]

1. Alternative Mandates

a. Water Pollution Control Act (FWPCA)

As originally enacted, FWPCA directed EPA to identify especially harmful pollutants[302] and to establish limitations on their discharge sufficient to protect the public health with "an ample margin of safety."[303] Although EPA initially identified nine such harmful pollutants, it failed to regulate any of them within the following four years because there was insufficient information to determine what limitation would produce an "ample margin of safety."[304] When environmentalists challenged EPA's failure to act, it agreed to limit 65 pollutants to the level permitted by best available control technology (BAT).[305] After the settlement, EPA administrator Douglas Costle testified that the agency could not operate effectively under the existing law and that EPA should be authorized to adopt a technology-based approach (BAT), in addition to a media-quality based approach (protect public health with an ample margin of safety). In addition to being easier to enforce, technology-based standards are often easier to establish (because they do not require highly uncertain inquiries into the possible toxicological effects of, and extent of, human exposure to hazardous chemicals), and they can be less burdensome to the regulated industry while providing at the same time an intermediate level of protection to humans and the environment.[306] Congress agreed with EPA and amended FWPCA to reflect the terms of EPA's settlement.[307]

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[297] See supra notes 216-217 & accompanying text (Supreme Court holds that OSHA must prove significant risk).

[298] 29 U.S.C. at §655(b)(5).

[299] 33 U.S.C. §§1251-1376 (1982).

[300] 42 U.S.C. §§7401-7642 (1982).

[301] 21 U.S.C. §§360c-360k (1982).

[302] 33 U.S.C. §1317(a)(1) (1982).

[303] 33 U.S.C. at §1317(a)(4).

The amended FWPCA requires EPA to establish a list of dangerous toxic pollutants[308] and to regulate them by an "effluent limitation" or an "effluent standard."[309] Effluent limitations are promulgated on an industry by industry basis and require the application of the "best available technology economically achievable."[310] Effluent standards are promulgated on a pollutant-by-pollutant basis and require "an ample margin of safety."[311] EPA has discretion which type of regulation to adopt, but effluent standards may be used only if they impose more stringent requirements.[312] Since the amendments, EPA has relied almost exclusively on effluent limitations for pollution control.[313]

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[304] Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 STAN. L. REV. 1267 1307-08 (1985).

[305] Id. at 1308-09.

[306] HOUSE COMM. ON PUB. WORKS AND TRANSP., 95TH CONG., LST SESS., IMPLEMENTATION OF THE FEDERAL WATER POLLUTION CONTROL ACT: SUMMARY OF HEARINGS ON THE REGULATION AND MONITORING OF TOXIC AND HAZARDOUS CHEMICAL UNDER THE FEDERAL WATER POLLUTION CONTROL ACT (P.L. 92-360) 28-29 (Comm. Print 1977). Mr. Costle testified:

> [E]xperience with the alternative approaches . . . offered by Section 307(a) on one hand and technology-based standards on the other leave us firmly convinced that for the bulk of known or suspected toxics of concern, technology-based standards established on an industry-by-industry basis are by far the most feasible to implement and administer."

Id.

[307] Latin, supra note 304, at 1309.

[308] 33 U.S.C. at §1317(a)(1).

[309] 33 U.S.C. at §1317(a)(2).

The FWPCA amendments provide a more flexible mandate for for EPA. EPA can impose the more stringent "effluent standards" if it has sufficient information on toxicity and exposure, but it can also impose the less stringent "effluent limitations" if the necessary information is lacking. If EPA uses less stringent regulation, its burden of proof is reduced. To prove BAT, EPA need only determine what type of technology is being sold on the market for abatement of the chemical it is regulating. To prove ample margin of safety, EPA has the more difficult job of determining at what level of exposure a chemical becomes dangerous to people and the environment. The evidence for those judgments is usually difficult to obtain and, if available, it is difficult to interpret.[314]

b. Clean Air Act (CAA)

The CAA requires EPA to establish and maintain a list of air pollutants which "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare"[315] and to promulgate national primary and secondary air quality standard for each pollutant.[316] In 1977, Congress amended the Act for two reasons. There was considerable congressional dissatisfaction with EPA's implementation of the original legislation,[317] and the 1970 Act required clarification after the courts held EPA must prevent any "significant deterioration" of the quality of air where it was cleaner than required by ambient air quality standards.[318] The primary change Congress made was to strengthen the antidegradation policies that apply to new sources of pollution.[319] In "attainment areas," which are areas of the country where air quality is better than any ambient standard requires, the 1977 Act established a modified "prevention of significant deterioration (PSD)" program, which requires new sources of pollution to employ "best available control technology."[320] The PSD program also prohibits new sources of pollution from degrading air quality in any attainment area, however clean it may be, beyond specified maximum allowable increases.[321]

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[310] 33 U.S.C. at §1317(a)(2).

[311] 33 U.S.C. at §1317(a)(2), (4).

[312] 33 U.S.C. at §1317(a)(2).

[313] Latin, _supra_ note 304, at 1309.

[314] _See Responses to Occupational Disease_, _supra_ note 2, at 1258 (definitive test information about whether a chemical is dangerous is often unavailable); McGarity, _Media Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation_, 46 L. Contemp. Prob. 159 (1983).

[315] 42 U.S.C. §7408(a)(1)(A) (1982).

[316] _Id_. at §7409(a)(1)(A).

The program to establish maximum allowable increases in pollution was implemented through a classification system. Regions of the country are placed in one of three classes, maximum allowable increases in pollution are set for each class, and the states are required to establish plans to ensure those maximums are not exceeded. The classes differ as to how much of an increase in pollution is allowed with Class I being the most strict and Class III being the least strict.[322] Congress specified that national parks and wilderness areas were to be designated as Class I, that all other areas were to be treated initially as Class II,[323] and that the states could redesignate a Class II area as Class III.[324] EPA, however, can disapprove any redesignation if a state does not comply with applicable procedural and substantive constraints.[325]

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[317] _See_ CONG. RESEARCH SERVICE, 95th CONG., 2d Sess., 4A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS of 1977, at 2363-70 (Comm. Print 95-16, 1978). Grounds for dissatisfaction included EPA's failure to issue regulations to control some widespread pollutants, the failure of many air quality regions to comply with existing ambient standards, the existence of new scientific information that suggested existing national standards were not adequate, and the fact that the safety margins that EPA incorporated in air quality standards were smaller than those in other preventative regulations and could prove inadequate given uncertainties about the health and ecological risks posed by air pollution. Latin, _supra_ note 304, at 1310; D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS §4.07 (1981).

[318] Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972). The Court of Appeals affirmed the decision without opinion and the U.S. Supreme Court failed to overturn it by a 4-4 vote. Fri v. Sierra Club, 412 U.S. 541 (1973).

[319] Latin, _supra_ note 304, at 1310.

[320] _Id_. at §7475(a)(4).

[321] _Id_. at §7473(a)-(b).

The 1977 CAA amendments seek to make EPA more productive in five ways. First, regulation of increases in pollution in attainment areas is authorized without proof that such increases are harmful.[326] Second, EPA's burden of proof concerning regulation of particular sources is simply to specify an emissions limitation that reflects the installation of the "best available technology."[327] Third, a classification system is used to set maximum allowable increases in pollution.[328] Fourth, Congress specified an initial classification of all areas thereby relieving EPA of that burden.[329] Finally, the states were assigned the burden of justifying allowing additional increases in pollution.[330]

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[322] Id. at §7473. Congress itself set the maximum allowable increases for particulates and sulfur dioxide. Id. at §7473(b). It ordered EPA to establish maximum allowable increases for each class for other pollutants. Id. at §7476.

[323] Id. at §7472.

[324] Id. at §7474.

[325] Id. at §7474((b)(2).

[326] See supra notes 320-21 & accompanying text (in attainment areas, EPA can regulate new sources of pollution without establishing they are harmful).

[327] See supra note 320 & accompanying text (new sources of pollution are required to employ BAT).

[328] See supra notes 322-25 & accompanying text (description of classification system of regulation).

[329] See supra notes 323-24 & accompanying text (description of how Congress specified classifications).

[330] See supra notes 324-25 & accompanying text (states can redesignate areas into Class III if EPA approves).

c. Medical Devices Amendments (MDA)

Prior to 1976, FDA could seize and ban the sale of any adulterated or misbranded medical device,[331] but it had the burden of proving adulteration or misbranding. Although FDA still retains those powers, the MDA extended the agency's regulatory authority by establishing three classifications for devices. Class III devices can not be marketed without prior approval by FDA, class II devices must comply with performance standards, and class I devices are subject to general controls.[332] Further, all devices are to be designated initially as Class III. FDA will reclassify a device if an applicant can prove that Class II or I controls are sufficient to assure its safe and effective use.[333] Requests to reclassify devices are submitted to an advisory committee for its recommendations.[334]

These amendments are another example of how a classification system has been used to increase the potential for agency productivity. The amendments establish three levels of regulation and presume that the strictest level is appropriate. The burden is then shifted to the manufacturer of a device to establish that less strict regulation is appropriate.

2. An Alternative OSHA Mandate

a. Exposure Limitations

The previous regulatory schemes share three characteristics. First, Congress created a more flexible burden of proof because an agency was unable to regulate productively under its original mandate. In two cases (water toxics and PSD), the agency had already begun to implement a more flexible system, and Congress merely ratified the agency's own solution with some fairly minor changes. Second, the reform was accomplished by modifying the agency's obligation to prove a chemical is harmful, by adopting a classification system of regulation, or both. Third, all of the reforms provided that once a classification (of a chemical or a geographic area) was made by Congress or the agency, the person seeking a redesignation is given the burden of proof to justify the change.

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[331] 21 U.S.C. §§331-332, 334, 351-352 (1982).

[332] *Id.* at §360c(a)(1). Class III devices are those for which premarket approval is necessary to assure their safety and effectiveness. They include pacemakers, IUDs, contact lenses, heart replacement valves, and artificial hearts. Class II devices are those for which a performance standard is necessary to assure safety and effectiveness. They include hearing aids, blood pumps, catheters, cardiograph electrodes, syringes. Class I devices are those for which general controls are sufficient to provide a reasonable assurance of safety and effectiveness. They include crutches, bandages, splints, tongue depressors, and bedpans. *Id.* at §360(a)(1).

[333] *Id.* at §360c(f).

[334] 21 U.S.C. §360c(f)(2)(B).

Congress could incorporate these ideas into a regulatory mandate for OSHA. First, OSHA would be required to establish a list of chemicals and other substances that "could reasonably be anticipated to cause a material impairment of health or functional capacity." Congress could specify that OSHA list should contain at least those chemicals considered to be carcinogens or suspected carcinogens by the National Toxicology Program, the International Agency for Research on Cancer (IRAC), and/or some other expert body. Second, the substances on the list would be regulated by OSHA in the manner indicated in the following chart:

CLASS	DEFINITION	LEVEL OF REGULATION
I	Regulation as Class II presents a "significant risk of material impairment"	Extent permitted as feasible
II	Any hazard on list presumed to be in this class unless redesignated	Extent permitted by BAT
III	Regulation as Class II unnecessary to prevent a "reasonable anticipation of material impairment."	Extent permitted by nongovernmental consensus standard

All hazards on the list would be presumed to be within Class II, unless redesignated by OSHA. For any Class II hazard, OSHA would reduce exposure to the extent permitted by the "best available control technology." The term "best available technology" would connote a technology-based standard for reducing worker exposure to the risk that would be less burdensome than the "feasibility" test under which OSHA currently regulates substances with "no-effect" levels. The "best available technology" standard would oblige OSHA to write a standard that has in practice been met in at least one existing plan (or pilot plant), or that can predictably be transferred from another industry with similar health and safety problems.

OSHA would redesignate a hazard to Class I if regulation under Class II would leave workers exposed to "a significant risk of material impairment to health or functional capacity." For Class I hazards, OSHA would reduce exposure to the extent that was "feasible." A hazard would be redesignated as Class III if regulation under Class II was unnecessary to avoid a "reasonable anticipation of material impairment of health or functional capacity." For Class III hazards, OSHA would reduce exposure to the extent permitted by any applicable nongovernmental consensus standard. If no nongovernmental standard were applicable, OSHA would require that exposure be reduced to the level which would avoid a "reasonable anticipation of material impairment of health or functional capacity."

These suggested reforms emulate the changes Congress has made in other statutes. The proposal requires a list of harmful chemicals be established (like FWPCA and CAA),[335] requires a classification scheme of regulation (like CAA and MDA),[336] mandates an initial classification (like CAA and MDA)[337] and requires that deference be given to the agency's ultimate classification (like CAA and MDA).[338] The reforms also modify the substantive criteria that OSHA would apply for Class II by adopting the standard of "best available technology" (like FWPCA and CAA).[339]

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[335] For the Clean Water Act, EPA lists chemicals that are "toxic," 33 U.S.C. at §1317(a)(1), and "toxic pollutant" is defined as a pollutant that "will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, generic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations in [humans or aquatic organisms] or their offspring." 33 U.S.C. § 1362(13). For ambient air quality standards under the Clean Air Act, it lists chemicals that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. at §7408(a)(1)(A). EPA also lists "hazardous air pollutants," which are defined to include any "air pollutant to which no ambiant air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1). OSHA would list chemicals that "could reasonably be anticipated to cause a material impairment of health or functional capacity, even if workers have exposure to the hazard for the period of their working life."

[336] *See supra* notes 315-25 & accompanying text (CAA); and *supra* notes 331-34 & accompanying text (MDA).

[337] *See supra* note 322 & accompanying text (CAA); *supra* note 332 & accompanying text (MDA).

[338] *See supra* notes 315-25 & accompanying text (CAA); and *supra* notes 331-34 & accompanying text (MDA).

Regulation under the new mandate would not differ greatly from the existing process. OSHA would issue an announcement of a proposed rulemaking which included the classification of the hazard. Interested persons could file comments and otherwise participate in the hearing process as at present, except they could also raise two types of objections. First, they could object that the chemical being regulated could not be reasonably anticipated to cause a material impairment of health or functional capacity even if exposures would exceed those permitted under a Class III classification. Second, they could propose a classification different than the one proposed by OSHA. For either or both objections, they could submit evidence to support their arguments. After OSHA issued a final health standard, any interested party could seek judicial review as at present. Under the new mandate, a reviewing court would consider whether the class of regulation chosen by OSHA was arbitrary and capricious, based on the evidence and policy judgments relied upon by the agency and the evidence and arguments submitted by interested parties.

b. Other Protections

Congress could further improve OSHA's regulatory process if it emulated one of the features of the Medical Devices Amendments. The amendments specify that Class III devices require premarket approval, Class II devices require performance standards, and Class I devices require general controls. To establish a similar arrangement, Congress could specify standardized protections that would be applicable to each class of chemicals, or could require OSHA to do so in a single generic rulemaking. When OSHA currently promulgates a health standard, it not only establishes an ambient exposure limitation, but it also requires other protections such as exposure monitoring, medical surveillance, the removal of employees to other work as a medical precaution, employee training and education, and warning labels and signs.[340]

If OSHA specified the protections, it would hold a rulemaking proceeding for that purpose. After generic standards were promulgated, OSHA would incorporate them into any proposal for a health standard. Interested parties could file comments objecting to the application of any of the generic requirements in a particular case. If these comments persuaded OSHA, it could grant variances as appropriate. OSHA's decision whether or not to grant a variance would be subject to judicial review.

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[339] _See supra_ note 314 & accompanying text (FWPCA); _supra_ notes 315-25 & accompanying text (CAA).

[340] _See supra_ notes 200 & accompanying text.

When it authorizes the use of standardized protections, Congress could also speed rulemaking if it gave OSHA guidance concerning which types of protections are appropriate in certain circumstances. For example, Congress could help OSHA by indicating the extent to which employers should be permitted to use respirators to comply with ambient exposure limitations. Workers, who object to the confining nature of respirators and their inefficacy, argue for engineering controls, such as ventilation systems. Employers, who object to the costs of such controls, argue that workers can be equally well protected by respirators. OSHA has generally required the use of engineering controls, but it often delays their implementation as a compromise.[341]

3. Advantages and Disadvantages

A classification scheme should increase the protection available to workers. In cases where there is sufficient information to justify the strictest level of regulation (Class I regulation), the proposal operates in the same manner as the existing act. Workers are entitled to a reduction in risk to the level of feasibility. In cases where there is insufficient information to justify that level, however, OSHA will still be able to regulate. At present, OSHA does not have that option. If OSHA can not prove a significant risk, the exposure of workers to chemicals is limited only by the Table Z standards, which are hopelessly out of date.[342]

Although this proposal gives OSHA additional regulatory authority, workers may object because the proposal can shift the burden of justifying a stricter level of regulation to them. If OSHA proposes that a chemical should remain designated as Class II, workers could ask that it be redesignated as Class I. If OSHA disagrees, however, workers would need to prove that OSHA's classification was arbitrary and capricious, or the Class II designation would be affirmed.

Workers, however, are in a similar position under the existing act whenever they disagree with OSHA about the proper level of regulation. Under the existing act, workers have the opportunity before a rule is proposed to recommend what level of protection is feasible. If OSHA proposes a less strict exposure limitation, they can file comments supporting a stricter limitation. If OSHA adopts the less strict limitation, it should be affirmed if OSHA has substantial evidence for its position.

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[341] Responses to Occupational Disease, supra note 2, at 1259.

[342] See supra notes 193-96 & accompanying text.

A more profound objection to the proposal is that it weakens the substantive principle, established by the existing statute, that workers are entitled to be protected to the extent "feasible." This asserted "right," however, was substantially diluted by the Benzene decision, which held that workers are entitled to maximum protection only if OSHA can first prove a hazard presents a "significant risk." The reality is that in many cases either OSHA can not meet that burden of proof, or it takes so long to do so that it can not regulate more than one or two hazards a year. Part One of this report indicates that internal reforms are unlikely to accelerate greatly OSHA's productivity. Only changes in the agency's substantive mandate are likely to increase significantly its rulemaking output.

Employers are likely to object that OSHA would have too much discretion to promulgate regulations whose costs exceed their benefits. OSHA's existing authority has been criticized because it permits the agency to regulate without proving that the benefits of a rule are reasonably related to its costs.[343] Employers are protected to some extent, however, by the requirement that OSHA must prove a significant risk exists before it can regulate.[344] The proposal would weaken that protection by authorizing OSHA to regulate if there is a "reasonable anticipation" that workers are endangered.

Three responses can be made to this objection. First, unless OSHA's burden of proof is adjusted, workers can not be protected in the manner Congress intended when it enacted

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[343] See, e.g., J. MENDELOFF, REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH 67-71 (1980). In American Textile Manufacturers Institute, v. Donovan (frequently referred to as the Cotton Dust case), the Supreme Court upheld OSHA's cotton dust standard by deciding that Congress had not required that the benefits of a rule be reasonably related to its costs. 452 U.S. 490, 509 (1981). Instead, the Court believed that Congress itself struck a balance between costs and benefits by ordering that OSHA to place "the 'benefit' of worker health above all considerations" except those technological or economic considerations that would make the "attainment of this 'benefit' unachievable." Id.

[344] Notes 96-99 supra & accompanying text.

OSHA.[345] Congress has adopted similar regulatory schemes for EPA and FDA precisely because those agencies were unable to regulate effectively under their original mandates. Second, in cases where OSHA has a lower burden of proof, it also has less regulatory authority to impose costly requirements. If there is only a reasonable anticipation of harm, OSHA can require the reduction of exposure only to the level of BAT, and not to the level of feasibility. Finally, when OSHA proposes an inappropriate regulation, employers can obtain lower costs by proving that a class II (BAT) or a class III (nongovernmental standard) is appropriate.

4. Legality Under The *Benzene* Decision

Employers will probably also argue that, under the *Benzene* decision a "significant risk" test is constitutionally required. In *Benzene*, a plurality of the Supreme Court held that OSHA can promulgate a health standard only if the agency first proves that the regulation is "necessary and appropriate to remedy a significant risk of material health impairment"[346] and, in a later case, the entire Court reaffirmed this requirement.[347] The plurality reasoned that Congress could not have intended to give OSHA the power to require the elimination of any risk, however insignificant, constrained only by the requirement of feasibility.[348] They concluded that "[i]f the Government were correct in arguing that neither [statutory section] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in A.L.A. Schecter Poultry Corp, v. Ryan . . . ."[349] In Schecter Poultry,[350] the Court held that a key provision of the National Industrial Recovery Act was unconstitutional as a violation of the nondelegation doctrine or the constitutional requirement that only Congress shall exercise legislative powers.[351]

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[345] *See supra* Part VIII. Professor Latin explains this reality in terms of carcinogens:

> The current treatment presupposes individualized analysis of specific exposure levels under specific industrial or environmental conditions, and of specific risks to humans of specific kinds of cancer at the identified exposure levels. All of this scientific information may be logically relevant to the estimation of carcinogenic risks and would be desirable in an ideal world. Nevertheless, the practical consequences of making particularized risk estimates legally relevant -- indeed mandatory -- is to emasculate the regulation of carcinogens under prevailing conditions of scientific uncertainty.

Latin, *supra* note 304, at 1329.

[346] 448 U.S. 607, 639 (1980).

[347] *See* American Textile Mfgs. Inst. v. Donovan, 452 U.S. 490, 505 n.25 (1981) (OSHA determined that exposure to cotton dust presented a significant health hazard).

The delegation doctrine should not preclude the proposal made here. OSHA justified its benzene regulation on the basis of its cancer policy which stipulated that if no safe level of exposure could be calculated for a hazard, OSHA would reduce its risk to the extent feasible. The plurality worried that if it accepted OSHA's position, the agency would have "unprecedented power" to "impose enormous costs that might produce little, if any, discernable benefits."[352] This objection, however, does not apply to this proposal for three reasons. First, the proposal does not subject industry to "unprecedented power." EPA and FDA operate under similar legislative grants of authority. Second, the proposal requires proof of significant risk if industry is required to reduce a hazard to the point of feasibility. It is therefore not inconsistent with the Benzene decision. Third, OSHA is not entitled to regulate at the other levels without proof of harm. OSHA must prove that there is a "reasonable anticipation" that a chemical is harmful to regulate at BAT or a nongovernmental consensus standard.

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[348] Id. at 645.

[349] Id. at 646 (emphasis added).

[350] 295 U.S. 495 (1935).

[351] U.S. Const. Art. I, §1 states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

5. **Recommendations**

We recommend that Congress amend the Occupational Safety and Health Act to address the problem of regulatory productivity. The present law presupposes that OSHA can effectively develop the scientific information necessary to evaluate the harm posed by a chemical. The practical consequences of requiring such proof, however, is to weaken substantially the regulation of health hazards under prevailing conditions of scientific knowledge.

Congress should replace the present system with one that emulates the FWPCA, CAA, and MDA. In these statutes, Congress has authorized different classes of regulation, specified an initial designation, established a lower burden of proof for regulation that is less strict, and has indicated that the agency is to receive deference for its final choice of which class of regulation to apply.

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[352] 448 U.S. at 607, 645 (1980). Justice Stevens explained:

> In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§3(8) and 6(b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen -- either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures -- would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernable benefits.

Id.

> **RECOMMENDATION:** Congress should establish a more flexible regulatory mandate for OSHA. First, OSHA would be required to establish a list of hazards that "could reasonably be anticipated to cause a material impairment of health or functional capacity." Hazards on the list would be presumed to be Class II hazards, unless redesignated by OSHA. For any Class II hazard, OSHA would reduce exposure to the extent permitted by the "best available technology (BAT)." Second, a hazard would be redesignated as Class I if regulation as a Class II hazard would still leave workers exposed to "a significant risk of material impairment of health or functional capacity." For Class I hazards, OSHA would reduce exposure to the extent "feasible." Third, a hazard would be redesignated as Class III if regulation as a Class II hazard was unnecessary to avoid a "reasonable anticipation of material impairment of health or functional capacity." For Class III hazards, OSHA would reduce exposure to the extent permitted by any applicable nongovernment health standard. If no nongovernmental standard were applicable, OSHA would require that exposure be reduced to that level which would avoid a "reasonable anticipation of material impairment of health or functional capacity."

Congress should also authorize OSHA to adopt standardized protections for each of the three classes of health hazards. These regulations would specify what protections an employer must undertake in addition to compliance with an ambient exposure limitation.

> **RECOMMENDATION:** If Congress establishes a classification scheme of regulation for OSHA, it should also require OSHA to promulgate standardized protections for each class of health hazards. These could include exposure monitoring, medical surveillance, the removal of employees to other work as a medical precaution, employee training and education, and warning labels and signs. The standardized protections would be incorporated as part of any proposed health standard, the agency could grant exemptions as appropriate, and its decisions would be subjected to judicial review.

C. Access To Testing Data

Health and safety agencies could function more effectively if they had better data, particularly about the risks posed by chemicals. Epidemiological and animal test data have been published for only a limited number of the thousands of chemicals commonly found in workplaces.[353] Most testing of chemicals that are candidates for regulation is done outside of the government -- by university scientists, commercial laboratories, or manufacturers themselves -- and OSHA generally must await the results from those sources.[354] It does, however, have two options to seek new data.[355] OSHA can ask the National Toxicology Program to test a chemical or it can request EPA to obtain information for it.

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[353] Responses to Occupational Disease, supra note 2, at 1232-33; CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSMENT OF TECHNOLOGIES FOR DETERMINING CANCER RISKS FROM THE ENVIRONMENT 21 (1981) ("Additional studies might help resolve the existing controversies and, more importantly, might pinpoint opportunities for regulatory and voluntary reduction in exposures."); see ASSOCIATION OF SCHOOLS OF PUBLIC HEALTH, supra note 81, at 40 (OSHA should identify "gaps in information used to set priorities for epidemiological and toxicologic studies" and act to acquire the necessary information); Registry Meeting Generates Questions on Exposure Definition, Scope, Litigation, OCCUPATIONAL SAFETY & HEALTH REP. 1133 (Apr. 1, 1987) (government needs a Disease Registry to identify and track people exposed to toxic substances, and it needs to coordinate clinical and research activities); Lack of Funds, Reporting Requirements Hinders Monitoring of Illness, Panel Finds, OCCUPATIONAL HEALTH & SAFETY REP. 516 (Oct. 10, 1986) ("Federal surveillance of occupational illness is 72 years behind that of communicable disease mainly because of lack of reporting requirements and funding . . . .").

[354] See Merrill, supra note 127, at 102 (health and safety agencies generally can do little to generate new data concerning dangers posed by chemicals).

The National Toxicology Program (NTP), which is a multi-agency chemical testing program housed in the Department of Health and Human Services, accepts nominations from regulatory agencies, including OSHA, of chemicals to be tested for toxicity. The purpose of the program is to coordinate governmental needs for health and safety testing of potentially dangerous chemicals.[356] In 1982, the Administrative Conference recognized the potential of NTP to assist OSHA and other health and safety organizations, particularly concerning the study of chemicals that may be regulated by more than one agency. ACUS recommended that NTP "should continue to encourage the participation of EPA, OSHA, FDA, and CPSC in its selection of chemicals for testing" and it noted that NTP "should be willing, on request, to assist agencies in their evaluation of study findings."[357]

EPA has authority under the Toxic Substances Control Act (TSCA) to order anyone who manufacturers or processes a chemical to test it if its use "may present an unreasonable risk of injury to health or the environment, there are insufficient data and experience upon which the effects of such chemical . . . on health or the environment can be reasonably be determined, and testing of such substance . . . with respect to such effects is necessary to determine such data." TSCA establishes an eight person committee to make recommendations to EPA concerning which chemicals should be tested, and one member of that committee is appointed by the Secretary of Labor from persons who administer the Occupational Safety and Health Act. EPA also has the authority to require chemical manufacturers and processors to collect, record, and submit a variety of data that can be used to determine whether regulation is necessary. These include data on chemical production, use, exposure, and disposal; records of allegations of significant adverse reactions to health or the environment; unpublished health and safety studies; and notification of previously unknown risks.[358]

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[355] OSHA can also obtain data on its own authority, but the information is of limited use in evaluating health hazards. OSHA has promulgated regulations requiring employers to maintain records of work related deaths, injuries, and illnesses. 29 U.S.C. §§657(c)(1)-(2) (1982); 29 C.F.R. §1904 (1986). Compilation of the data is done by the Bureau of Labor Statistics (BLS), an agency of the Department of Labor. The information developed, however, is of limited epidemiological value. The BLS statistics do not reflect the portion of occupational diseases which are chronic and long-term in nature, because of problems of detection and of establishing occupational relationships. B. MINTZ, supra note 129, at 344; Responses To Occupational Disease, supra note 2, at 1236.

OSHA also obtains information from its inspectors, and this information can be used by OSHA to recognize and prevent safety hazards. Inspectors, however, are unlikely to detect many new health hazards. REPORT ON RULEMAKING PROCEDURES, supra note 14, at 67-68.

[356] REPORT ON OSHA RULEMAKING PROCEDURES, supra note 14, at 114.

[357] Recommendation 82-5, 1 C.F.R. §305.82-5, at 144 (1987).

Neither of these options has worked well to date. Although NTP could be a useful resource for OSHA, OSHA does not always take advantage of this resource. In some years, it apparently has failed to ask NTP to test chemicals for it.[359] EPA has recently started to gather information useful to OSHA and its own programs, but it has generally been slow to utilize TSCA to produce information about chemicals.[360]

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[358] 15 U.S.C. §§2603(a)(1)(A) (1982) (standard for testing); id at §2603(e)(1), (e)(2)(A) (advisory committee requirements); id at §2607 (reporting requirements).

[359] Telephone Interview with Dr. David Rall, Director, National Toxicology Program (April 22, 1987).

Although OSHA's use of these resources could be increased, it will always be obligated to share them with other health and safety agencies. OSHA can ask NTP to test chemicals for it, but NTP must service the requests of other agencies as well. OSHA can ask EPA to seek data for it, but EPA will evaluate such requests in light of its own data needs, the needs of other agencies, and the resources available to administer the testing program.

OSHA could avoid some of those problems if it had its own authority to order testing, and some commentators have

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360. _See_, _e.g._ _Reporting Rule To Be Proposed By EPA Would Call For Information On 47 Chemicals_, OCCUPATIONAL SAFETY AND HEALTH REP. 366 (Sept. 10, 1986). Although TSCA was passed in 1976, the first rule EPA promulgated to require a company to test a chemical occurred in 1985. 50 Fed. Reg. 48762 (1985); _see_ GENERAL ACCOUNTING OFFICE, EPA'S EFFORTS TO IDENTIFY AND CONTROL HARMFUL CHEMICALS IN USE 26, 33 (1984) (EPA issued no rules requiring testing from 1976 through 1984). From 1976 to 1979, EPA consistently missed the one year deadline set by the Act for the agency to respond to recommendations for testing by the Interagency Testing Committee (ITC). M. WOROBEC, TOXIC SUBSTANCES CONTROL PRIMER 25 (1986). In 1979, the Natural Resources Defense Council sued EPA over the delay and, in 1981, EPA was ordered to respond within three years to the seventy-two outstanding ITC recommendations. _Id_. EPA responded by determining that a chemical did not have to be tested or by negotiating an agreements with a manufacturers or processor that it would test a chemical. GENERAL ACCOUNTING OFFICE, _supra_, at 32-33. Natural Resources Defense Council, Inc. v. EPA, 595 F. Supp. 1255 (D.D.C. 1984), held that the agreements were inconsistent with TSCA because they were not enforceable. In 1986, EPA issued an interim rule providing for the use of enforceable voluntary testing agreements. Such agreements will be used if the agency, the company, and public interest advocates consent to its use. 51 Fed. Reg. 23706 (1986). Moreover, EPA issued ten testing rules in 1985 and 1986. 50 Fed. Reg. 48762, 51683, 51857, 53157 (1985); 51 Fed. Reg. 33047, 32079, 11728, 15771, 24657, 40318 (1986).

recommended that Congress consider this option.[361] This proposal, however, is premature until it becomes clear that EPA and NTP are incapable of adequately servicing OSHA's data needs. If additional experience indicates that EPA and NTP can not serve OSHA's needs, then Congress may wish to authorize OSHA to order testing on its own authority. Moreover, by monitoring EPA's efforts, Congress could determine whether changes in TSCA would assist OSHA if it were given the authority to test.

Although authorizing OSHA to order testing is not yet necessary, Congress can produce additional information for OSHA. First, it can commit additional resources to NTP or other government agencies responsible for the testing of chemicals. Second, it can use its oversight authority to ensure that OSHA takes advantage of NTP's facilities in appropriate cases and to ensure that EPA is responsive to OSHA requests that a chemical be tested. It can also ensure that EPA is responsible to OSHA by requiring EPA to respond within a specified time period to any requests from OSHA that a chemical be tested.

Since resources for testing chemicals will always be limited, it is important that these resources not be wasted. In 1982, the Administrative Conference recognized that efficient use of testing resources primarily depends on careful priority setting and interagency coordination.[362] ACUS noted that if agencies engage in careful priority-setting, they can "coordinate their testing, evaluation, and regulatory efforts." In 1987, ACUS recommended to OSHA procedures by which it could establish its priorities.[363] Congress should therefore monitor whether OSHA has complied with this recommendation and, if not, seek to determine what type of priority-setting procedures, if any, were adopted.

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[361] E.g., Responses To Occupational Disease, supra note 2, at 1297.

If OSHA could order testing, it is unclear whether employers or manufacturers should have the responsibility to undertake the testing. Since OSHA regulates the exposure of workers to chemicals, it would seem that employers should have that responsibility. But this result could be unfair and inefficient. Since a chemical is typically used in several, and even many, workplaces, it would be unfair to require any one employer to pay for the costs of the testing. All employers could be required to pay, but an agreement would have to be reached between them concerning their respective rights and duties. Those transaction costs could be eliminated if the manufacturer was responsible for the testing since it could pass along the costs of testing to all of its buyers.

[362] Recommendation 82-5, supra note 357.

Congress should also act to encourage necessary interagency coordination. The Administrative Conference has noted that the creation during the Carter Administration of an Interagency Regulatory Liaison Group (IRLG) provided the opportunity for OSHA, EPA, FDA, and the Consumer Product Safety Commission to work jointly on chemical regulation. ACUS recommended that "[a]gencies should continue to cooperate in the identifying chemicals for which further testing is needed to permit regulatory assessments."[364] The Reagan administration, replaced the IRLG with a new and less elaborate coordinating apparatus, headed by the Office of Science and Technology Policy in the Executive Office of the President (OSTP).[365] This changeover, however, has not led to any obvious White House coordination of agency efforts to test chemicals. Moreover, critics charge that other White House efforts to generate coordinated policies in the areas of regulating carcinogens and biotechnology likewise have not met with great success.[366]

The responsibility for this type of coordination could be lodged with OMB, or Congress could require that an IRLG-like coordinating institution be used. The advantage of placing the responsibility in OMB is that this function could be related to other relevant oversight functions of OMB. OMB, however, is already overburdened with its regulatory review functions, and it is not clear that it would, or could, give this type of coordination a high priority. If the coordination function is initiated and operated by the agencies themselves through an IRLG-type of institution, it might receive more attention, particularly if it had the support and participation of the administrators of health and safety agencies. Moreover, this arrangement would not interfere with OMB's oversight function because any decisions of the group would come to OMB's attention in due course if they involved the expenditure of resources or the promulgation of relevant regulations. A representative of OMB could be made a member of an IRLG-like coordinating body to ensure any necessary liaison with the White House.

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[363] Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration (June 11, 1987) (to be codified at 1 C.F.R. §305.87-1); see REPORT ON RULEMAKING PROCEDURES, supra note 14, at Part II (justification for priority-setting procedures at OSHA).

[364] Recommendation 82-5, supra note 127.

[365] Merrill, supra note 127, at 177.

[366] See M. RUSHEFSKY, MAKING CANCER POLICY 149 (1986) ("Cancer policies stemming from EPA and OSTP were attempts to combine the scientific critiques and the regulatory relief streams to produce more risk tolerant policies. That effort was stymied both by the scandals that afflicted EPA and the continued strong support for environmental protection in Congress and the general public.").

> **RECOMMENDATION:** To maximize existing governmental resources for the testing of chemicals and for the evaluation of scientific information, Congress should establish an interagency coordination group whose membership includes OSHA and other health and safety agencies that regulate chemicals. The group should be assigned the coordination functions discussed in Recommendation 82-5 of the Administrative Conference. Membership in the group should consist of the agency administrators or their designee to ensure support of the participating agencies. There should also be a member from OMB to permit it to monitor the activities of the group and to participate in its deliberations.

IX. Deadlines and Hammers

Most health and safety agencies have been slow to promulgate regulations, and OSHA as slow as any. Congress has acted to speed the rulemaking process at EPA and it should consider the same type of reforms for OSHA.

A. Deadlines and Hammers at EPA

Congress has become increasingly dissatisfied with EPA's performance in the last few years. Aside from general complaints about mismanagement, incompetence, and neglect,[367] legislators were concerned that EPA was acting too slowly[368] to implement such statutes as the Safe Water Drinking Act (SWDA),[369] the Superfund program of the the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[370] the Resource Conservation and Recovery Act (RCRA),[371] the Clean Air Act (CCA),[372] and the Toxic Substances Control Act.[373] The agency's failure to enforce existing regulatory requirements was also condemned.[374]

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[367] See, e.g. H.R. REP. NO. 253, supra note 366, at pt. 1, 251 (Rep. Markey described "the dismal five-year history of the Superfund program" as "a relief etched with incompetence, mismanagement, and negligence"); H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, 55 (1985) [hereinafter cited as H.R. REP. NO. 253] (noting the EPA's "gross mismanagement" of the Superfund program); H.R. REP. NO. 890, 98th Cong., 2d Sess. 26 (1984) [hereinafter cited as H.R. REP. NO. 890] (program mismanagement during early years of the Superfund).

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[368] The House Energy and Commerce Committee expressed its concern "that EPA has not been able to comply with statutory deadlines and timetables . . . for virtually all of its problems." H.R. REP. NO. 198, 98th Cong., 1st Sess. pt. 1, 34 (1983) [hereinafter cited as H.R. REP. NO. 198].

[369] See, e.g., H.R. REP. NO. 168, 99th Cong., 1st Sess. 17 (1985) [hereinafter cited as H.R. REP. NO. 168] (overwhelming public concern about quality of the nation's drinking water "has not moved EPA to act. EPA has set few standards and has not yet regulated the many chemicals increasingly found in drinking water supplies."); S. REP. NO. 56, 99th Cong., 1st Sess. 5-6 (1985) [herinafter cited as S. REP. NO. 56] ("The greatest problem with implementation of the [SDWA] is the failure of EPA to issue standards for most contaminants known or anticipated to be found in drinking water.").

[370] See H.R. REP. NO. 253, supra note 366, at pt. 1, 255 (Superfund site clean-ups move "at a snail's pace"). A group of Representatives dissatisfied with the Superfund amendments drafted by the House Energy and Commerce Committee in 1985 stated that "[t]he entire history of the Superfund program definitively refutes the argument that EPA can be completely trusted to manage any discretionary Superfund cleanup schedule effectively." H.R. REP. NO. 253, supra note 366, pt. 1, 262.

[371] See, e.g., H.R. REP. NO. 198, supra note 368, at pt. 1, 70 ("Incredibly, . . . almost nothing has been done to fulfill" the EPA's statutory responsibilities concerning use of recycled materials by federal agencies); S. REP. NO. 284, 98th Cong., 1st Sess. 4 (1983) [hereinafter cited as S. REP. NO. 284] (the EPA's process of listing hazardous wastes "has been virtually stalled for several years.").

[372] See, e.g., H.R. REP. NO. 294, 95th Cong., 1st Sess. at 187 (discussing the need to rectify the EPA's "failure to establish adequate initial or revised standards for all categories of major stationary sources and for certain unregulated pollutants").

[373] See, e.g., S. 2083, 99th Cong., 2d Sess. § 2 (1986) (citing lack of EPA standards for identification and abatement of hazardous asbestos as reason for continued existence or possible worsening of asbestos hazards).

Legislators were also concerned that when EPA did act, it did so in a manner inconsistent with the objectives of applicable legislation. They believed EPA's regulations created unintended loopholes and exclusions,[375] were otherwise deficient in coverage,[376] or reversed previous regulatory decisions, exacerbating already severe environmental problems.[377]

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[374] See, e.g., H.R. REP. NO. 168, supra note 369, at 26 (General Accounting Office found that, despite nearly 150,000 violations of SDWA requirements, "the enforcement actions in the EPA offices . . . included in the review ranged from none to minimal, followed no pattern, and were not as timely as they would have or should have been."); id. at 17; H.R. REP. NO. 890, supra note 366, at pt. 1, 26 (the EPA's enforcement efforts under the CERCLA have lagged); H.R. REP. NO. 198, supra note 368, at pt. 1, 20 (the EPA's "inadequate effort" to enforce the RCRA is "distressing"); id. at 50-51 (describing "a truly egregious example" of the EPA's failure to enforce the RCRA in a timely manner).

[375] See, e.g., H.R. REP. NO. 198, supra note 368, at pt. 1, 25 (describing "unwarranted" exclusion of small generators from the RCRA's hazardous waste program); id. at 39 (the exemption from RCRA regulation of facilities that burn hazardous waste for energy recovery "has led to direct threats to human health and the environment"); id. at 44 (describing the exclusion of certain land disposal facilities from corrective action and groundwater monitoring requirements as "one of the most serious deficiencies" in the EPA's implementation of the RCRA); id. at 63 (the EPA's exemption of hazardous waste disposal facilities from groundwater monitoring requirements is "entirely inappropriate").

[376] See, e.g., id. at 56 (wastes hazardous to human health and the environment are not listed as hazardous under the EPA's RCRA regulations); S. REP. NO. 284, supra note 371, at 4 (the EPA's RCRA regulations listing hazardous wastes do not fully address the fact that some wastes are composed of numerous hazardous constituents); S. REP. NO. 56, supra note 369, at 5 (noting absence of any national primary drinking water regulations except for one class of synthetic organic chemicals).

[377] See, e.g., S. REP. NO. 284, supra note 371, at 2 (noting the "mistaken," "damaging," and "abrupt" suspension of a previous EPA ban on placing drums of liquid hazardous waste in landfills).

To address these various problems, Congress established a series of deadlines in the 1984 amendments to RCRA,[378] the 1986 amendments to SDWA,[379] CERCLA,[380] and the 1987 amendments to the

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[378] See, e.g., 42 U.S.C. § 6924(c)(2) (Supp. III 1985) (setting deadline for EPA promulgation of regulations minimizing the disposal of containerized liquid hazardous wastes in landfills); id. § 6924(g) (setting schedule for reviewing listed hazardous wastes and determining methods of land disposal protective of human health and the environment); id. § 6924(w) (setting deadline for EPA promulgation of permitting standards for underground storage tanks that cannot be entered for inspection); id. § 6923(c) (setting deadline for EPA promulgation of standards applicable to transporters of fuel produced from hazardous waste).

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[379] *See*, *e.g.*, Pub. L. No. 99-339, § 101(b), 100 Stat. 642, 643 (1986) (to be codified at 42 U.S.C. § 300g-1(b)(1))) (setting schedule for EPA promulgation of national primary drinking water regulations for specific contaminants); *id.*, 100 Stat. at 645 (to be codified at 42 U.S.C. § 300g-1(b)(7)(C)(i)) (setting deadline for EPA promulgation of criteria under which filtration is required as a treatment technique for public water systems supplied by surface water sources); *id.* § 201(b), 100 Stat. at 653 (to be codified at 42 U.S.C. § 300h-5(a)) (setting deadline for EPA modification of groundwater monitoring regulations for Class I injection wells).

[380] *See*, *e.g.*, Pub. L. No. 99-499, § 105(b), 100 Stat. 1613, 1625-26 (1986) (to be codified at 42 U.S.C. § 9605(b)-(c)) (deadlines for EPA revisions to the National Contingency Plan and hazard ranking system); *id.* § 110(4), 100 Stat. at 1638 (to be codified at 42 U.S.C. § 9604(i)(6)(A)) (deadlines for performance of health assessments by the Administrator of the Agency for Toxic Substances and Disease Registry for each facility on the National Priorities List (NPL)); *id.*, 100 Stat. at 1636-37 (to be codified at 42 U.S.C. § 9604(i)(2)-(3)) (deadlines for issuing list of at least 100 hazardous substances most commonly found at facilities on the NPL, for adding more hazardous substances to that list, and for preparing toxicological profiles of listed substances); *id.*, § 102, 100 Stat. at 1617 (to be codified at 42 U.S.C. § 9602(a)) (deadline for EPA regulations establishing reportable quantities for hazardous substances); *id.* § 116, 100 Stat. at 1653-54 (to be codified at 42 U.S.C. § 9616(b)-(e)) (schedules for evaluating facilities listed in the Comprehensive Environmental Response, Compensation, and Liability Information System, commencing remedial investigations and feasibility studies for facilities on the NPL, and commencing remedial actions at such facilities). The EPA issued a five-page time line of tasks subject to deadlines in the five years following the enactment of the 1986 amendments to the CERCLA. *See* Env't Rep. (BNA) -- Cur. Devs. 1197 (Nov. 14, 1986).

CWA.[381] Proposed changes in the Clean Air Act,[382] the Federal Insecticide, Fungicide, and Rodenticide Act,[383] and the Toxic Substances Control Act[384] would also impose a series of deadlines.

Congress also enacted additional requirements that during the congressional debates acquired the metaphorical label of "hammers." A "hammer" allows an agency a certain period of time to regulate; if at the end of that time it has failed to act, the "hammer" falls and a regulatory result prescribed by the statute automatically goes into effect. The 1984 RCRA amendments are illustrative. Congress listed a series of substances it deemed hazardous,[385] and it gave EPA up to four years to determine whether the disposal of those substances in a landfill would be dangerous to human health and the environment. If the agency fails to make that determination on time, a prohibition against their burial goes into effect automatically.[386] Similar hammer provisions have been proposed for other statutes.[387]

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[381] See, e.g., Pub. L. No. 100-4, § 301(f), 101 Stat. at 30 (1987) (setting deadlines for EPA issuance of regulations establishing effluent limitations for certain categories of point sources discharging toxic pollutants); id. § 308(f), 101 Stat. at 40 (to be codified at 33 U.S.C. § 1314(m)) (schedule for EPA publication of plan for reviewing and revising effluent guidelines); id. § 405(a), 101 Stat. at 69 (to be codified at 33 U.S.C. § 1342(p)(4)) (deadlines for EPA issuance of regulations setting forth permit application requirements for stormwater discharges); id., 100 Stat. at 70, 71 (to be codified at 33 U.S.C. § 1342(p)(6)) (deadline for EPA issuance of regulations establishing a program to regulate designated sources of stormwater discharges); id. § 406(a)(3), 100 Stat. at 71 (to be codified at 33 U.S.C. § 1345(d)) (deadline for EPA identification of toxic pollutants whose presence in sewage sludge may adversely affect public health or the environment).

[382] See, e.g., H.R. 967, 99th Cong., 1st Sess. § 3(a) (1985) (deadlines for EPA classification of substances to determine whether they are hazardous air pollutants and for issuance of national emission standards for categories of stationary sources emitting such pollutants); id. § 201 (deadline for EPA publication of list of motor vehicle hazardous air pollutants and issuance of emission standards for such pollutants).

[383] See, e.g., S. 1303, 99th Cong. 1st Sess. § 23 (1985) (deadline for various EPA actions to prevent the drift of pesticides onto nontarget property); id. § 13 (deadlines for reregistration of pesticide active ingredients).

[384] S. 2083, 99th Cong., 2d Sess. § 202(b), 133 CONG. REC. S1,476, S1,477 (daily ed. Feb. 20, 1986) (deadline for EPA promulgation of regulations for abatement of asbestos in schools).

The 1984 RCRA amendments also contain another type of hammer that establishes a specific requirement until EPA changes it. The amendments require the owners of new landfills or surface impoundments to install two liners to prevent chemicals leaks,[388] and, until EPA decides otherwise, they specify how the lower liner is to be constructed."[389] Similarly, Congress has in the Safe Drinking Water Act ordered the EPA to regulate a specific list of substances, but permitted the agency to substitute a limited number of substances it deems more worthy of regulation for those in the congressionally prescribed list.[390]

B. Deadlines for OSHA

1. General Advantages and Disadvantages

Proponents contend that statutory deadlines increase legislative and judicial accountability, speed agency action, and indicate legislative priorities. Congress is more likely to demand compliance because it has made a public commitment to a statutory deadline,[391] and the courts are more likely to expedite rulemaking because a missed statutory deadline is a clear breach of law.[392] Further, agencies will act more quickly because deadlines mitigate outside pressures to go slowly,[393] and because they provide the agency with a reason to end its analytical process and to reach a difficult, but necessary decision.[394] Finally, Congress can use deadlines to communicate to an agency what actions are most important to it.[395]

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[385] See, e.g., 42 U.S.C. § 6924(d)(2) (Supp. III 1985) (RCRA hazardous wastes include liquids containing arsenic, cadmium, chromium, lead, mercury, nickel, selenium, or thallium at or above certain concentrations); id. § 6924(e)(2) (hazardous wastes include specified dioxin-containing materials).

[386] § 6924(d)(1), (e)(1). See also id. § 6924(f)(3) (banning disposal of certain hazardous wastes by deep well injection until the EPA makes a determination concerning the need for such a prohibition).

[387] E.g., S. 2083, 99th Cong., 1st Sess. § 202(c)-(e) (1986) (specifying appropriate manner of removing asbestos from schools if the EPA fails to issue regulations on a timely basis).

[388] 42 U.S.C. § 6924(o)(1)(A) (Supp. III 1985).

[389] Id. § 6924(o)(5)(B) (requirement for a lower liner is deemed satisfied by the construction of "at least a 30 foot thick layer of recompacted clay or other natural material with a permeability of no more than 1×10^{-7} centimeter per second.")

[390] See Pub. L. No. 99-339, § 101(b), 100 Stat. 642, 643 (1986) (to be codified at 42 U.S.C. § 300g-1(b)(2)).

Opponents of statutory deadlines contend that deadlines decrease public confidence in agencies and compromise the quality of agency decisionmaking. Confidence is decreased because Congress sets unrealistic deadlines that agencies can not meet,[396] and, when they fail to comply, public distrust in the agency is increased. The public then demands even more strigent deadlines that agencies also cannot be met.[397] The quality of decisionmaking is compromised in several ways. First, agencies ignore deadlines because they are so numerous or because they are so unrealistic.[398] When the agency is sued, scarce agency resources are devoted to litigation,[399] instead of more worthwhile projects,[400] or the agency takes action in such haste that it will not withstand judicial review because of inadequate evidentiary support.[401] Second, strict time limits make it more difficult to obtain useful input from OMB[402] and the public.[403] Finally, strict deadlines constrain agency discretion, initiative and responsibility.[404]

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[391] Ogden, Reducing Administrative Delay: Timeliness Standards and Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight, 4 U. DAYTON L. REV. 71, 85 (1979) (hereinafter cited as Reducing Administrative Delay) (legislative imposition of standards for timeliness indicates the legislature's commitment to timely agency decision making). Missed deadlines generate public concern and thereby focus congressional attention on deadlines. ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT at 33 (1985) (hereinafter cited as ENVIRONMENTAL AND ENERGY STUDY INSTITUTE). Moreover, a statutory deadline provides a clear, articulable standard easily used by oversight committees at agency and budget review time. Reducing Administrative Delay, supra, at 85.

[392] Tomlinson, supra note 136, at 138; (statutory deadlines provide a clear standard for measuring "unreasonable delay" and shift burden to the agency to explain why it hasn't fulfilled Congress' expectations). Without such a deadline, a court would have to interpret the less clear requirement in the APA that agencies can not "unreasonably delay" their actions. 5 U.S.C. §706(1) (1982); see infra notes 412-24 & accompanying text (courts have difficulty interpreting unreasonably delay provision of APA).

[393] ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at ii. External pressures from OMB to cut back on resources can better countered if deadlines have distinguished a particular provision as a priority. Id. at 27.

[394] Without a deadline, agencies tend to delay difficult decisions in the hope that additional evidence will be forthcoming or the necessity for a decision will disappear. Id. at 30-31; see REPORT ON OSHA RULEMAKING PROCEDURES, supra note 14, at 191 (agencies tend to delay decisions by citing need for more information).

[395] ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at 41.

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[396] See, e.g., Graham, The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act, 1985 DUKE L.J. 100, 123 (the deadlines requiring the EPA to regulate hazardous air pollutants are "ludicrous"). A recent study indicates that the EPA has met few of the deadlines imposed on it. See ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at 12.

According to the critics, Congress sets unrealistic deadlines because it is insensitive to agency resource constraints and priority conflicts, Abbott, The Case Against Federal Statutory And Judicial Deadlines: A Cost-Benefit Appraisal, 39 ADMIN. L. REV. 171, 182 (1987), it is unfamiliar with the details of the regulatory process, SENATE COMM. ON GOVERNMENT AFFAIRS, STUDY ON FEDERAL REGULATIONS -- DELAY IN THE REGULATORY PROCESS, Part IV, S. Doc. No. 72, 95th Cong., 1st Sess. 147 (1977) (hereinafter cited as SENATE COMMITTEE), or it fails to appreciate that proceedings of difficult degrees of complexity require different deadlines. Tomlinson, supra note 136, at 122.

[397] ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at 43-44, 50. Former EPA Administrator William Ruckelshaus, an opponent of statutory deadlines, charges that the establishment of unrealistically short deadlines "undermines confidence in EPA managers, causes the public to measure them against unrealistic goals, and to think we've failed and obscure the successes we've made. Deadlines reinforce the sense that we (EPA) are not getting anywhere, to the detriment of public sense of confidence in government." Id. at 48. See also H.R. REP. NO. 253, supra note 3, at pt. 1, 311 (Rep. Dingell's view that "excessively rigid clean up schedules [under the CERCLA] are self defeating and actually encourage the kind of misfeasance and malfeasance that has crippled the Superfund program to date").

[398] ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at iv.

[399] See H.R. REP. 253, supra note 366, at pt. 1, 56, 71; Graham, supra note 396, at 124, 126.

2. Advantages and Disadvantages for OSHA

Critics argue that OSHA's experience with deadlines confirms that they create serious problems.[405] The Occupational Safety and Health Act imposes a series of deadlines on OSHA. First, if OSHA appoints a rulemaking advisory committee, there is a 270 day deadline for the completion of the committee's work and a 60 day deadline for OSHA's response to the committee's recommendations.[406] Second, OSHA must make a decision whether or not to promulgate a a proposed standard within 60 days after completion of any hearing held on it.[407] Third, if OSHA promulgates an emergency standard, it must promulgate any permanent standard "no later than six months after publication of the emergency standard."[408] In a study for the Administrative Conference, Professor Tomlinson concluded that "OSHA has found the statutory deadlines difficult to meet and has not normally met them," that the deadlines have "undermined OSHA's efforts to determine its own priorities by forcing it to concentrate its resources on rulemaking proceedings that are subject to statutory deadlines," and that the deadlines do not apply to the stages of the rulemaking process which are the most important causes of delay."[409]

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[400] See Env't Rep. (BNA) -- Cur. Dev. 1,975-76 (Feb. 21, 1986) (statement by EPA Administrator Lee Thomas that meeting deadlines in 1984 RCRA amendments may keep the EPA from being able to carry out essential work such as ensuring that unpermitted hazardous waste disposal facilities are safely closed down.). See also ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at 44; Graham, supra note 396, at 124-27 (the EPA's relatively fruitless attempt to comply with statutory deadlines for regulating hazardous air pollutants diverted resources from the development of emission standards for new sources).

[401] See H.R. REP. NO. 253, supra note 366, at pt. 1, 56, 71. See also Env't Rep. (BNA) -- Curr. Dev. 2,051-52 (Mar. 7, 1986) (criticisms by OMB officials); ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, supra note 391, at 35 (state official commented that "EPA has sacrificed a lot of quality to meet deadlines. Deadlines have served to degrade performance."). A recent study of deadlines imposed on the EPA, however, indicates that attempts to meet congressional deadlines rarely compromised the quality of EPA actions. See id. at 34, 37 (the EPA frequently ignores deadlines or seeks extensions if more time is needed to act); id. at 35 ("Our findings clearly negate the common argument that EPA sacrifices quality of workmanship to meet deadlines.").

[402] Abbott, supra note 396, at 197-98.

[403] Id. at 196.

[404] SENATE COMMITTEE, supra note 396, at 146-47.

[405] E.g. Tomlinson, supra note 136, at 195-212.

Although the particular deadlines Congress has created for OSHA have not been effective, more appropriate deadlines could have two types of benefits. First, they would focus legislative attention on OSHA at a time when it has been largely ignored by Congress. Although Congress has acted vigorously to set countless deadlines for EPA, it has done nothing to require OSHA to meet its responsibilities. For example, the Senate since 1982 has held only two oversight hearings on OSHA despite the agency's continuing problems in producing regulations.[410] Deadlines would help put OSHA's productivity on the legislative agenda and thereby increase congressional attention to protecting workers.[411] Moreover, it should improve legislative oversight. If deadlines are not met, Congress can require agency management to explain what problems are impeding their progress. Further, deadlines could prompt agency management to emphasize the alternative regulatory approaches discussed in Part I of this report. If the agency could not comply with the deadlines even after it used those alternatives, Congress would have ample evidence that OSHA's enabling act should be amended. Finally, deadlines would assist OSHA in seeking an appropriate level of resources. In oversight and appropriation hearings, OSHA would have the opportunity to demonstrate the level of resources necessary to meet applicable deadlines. Moreover, even if OMB did not allow OSHA to seek additional resources, deadlines would be useful. If OSHA missed deadlines and did not request additional resources, Congress would be alerted to the possibility that OMB budget oversight resulted in underfunding of the agency.

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[406] 29 U.S.C. at §655(b)(1) (advisory committee shall submit report within 90 days, but Secretary may extend deadline to not more than 270 days); at §655(b)(2) (OSHA shall propose a proposed rule within 60 days after receiving the recommendations of an advisory committee); *see supra* notes 135-38 & accompanying text (discussion of deadlines affecting advisory committees).

[407] *Id.* at §655(c).

[408] *Id.* at §655(c)(3).

[409] Tomlinson, *supra* note 136, at 201-203.

[410] A review of the Congressional Information Service Index for 1982-1986 cited only two Senate oversight hearings on OSHA. By comparison, the House of Representatives held forty oversight hearings during the same period. CONGRESSIONAL INFORMATION SERVICE INDEX OF HEARINGS 1982-1986. Both houses of Congress, however, did hold appropriations hearings. *Id.*

Second, without legislative guidance, the courts have floundered in trying to determine what constitutes "unreasonable delay." A good example of this problem is the interaction between the courts and OSHA concerning the field sanitation standard. Since 1971, OSHA has required employers to provide drinking water, toilets, and hand-washing facilities, but the standard did not apply to farmworkers until this year.[412] In 1972, El Congresso, an organization representing Hispanic Americans, petitioned OSHA to eliminate the exemption.[413] Over fourteen years of litigation followed.

In 1973, El Congresso sued OSHA for its failure to act on its petition. In 1977, the D.C. Circuit reversed a district court order that OSHA had to propose a standard to preserve "traditional agency discretion to alter priorities and defer action due to legitimate statutory considerations." The case was remanded back to the district court, however, to require OSHA to submit a status report and timetable.[414] When OSHA refused to commit itself to a completion date for the standard, the district court ordered the agency to complete the standard "as soon as possible."[415] In 1979, the D.C. Circuit again reversed the district court on the ground that OSHA had reasonably exercised its discretion in postponing the standard in order to confront more pressing business.[416] The court did hold that OSHA had to promulgate a standard eventually and that "some timetable" was to be submitted to the district court.[417] In 1981, OSHA agreed with El Congresso to promulgate a standard by February of 1985.[418] In January of 1985, however, OSHA requested a time extension, which was granted by the circuit court conditioned on no unreasonable delay by the agency.[419] In April, 1986, OSHA announced it would not promulgate a standard because the problem of field sanitation was more properly a matter for the states and because OSHA had more important priorities.[420] Eight days later, the agency reversed itself and said it would promulgate a standard, but only after a two year delay to allow the states to develop their own regulations.[421] In 1987, the D.C. Circuit rejected OSHA's decision as "unreasonable delay," characterized OSHA's delay as "a disgraceful chapter of legal neglect," and ordered the standard to be issued within "30 days of this mandate."[422] Although Labor Secretary Brock sought a rehearing and described the court's order as a "jackass decision,"[423] OSHA complied and the standard was issued fourteen and one-half years after the initial petition to the agency.[424]

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[411] See J. BERRY, THE INTEREST GROUP SOCIETY 7 (1984) ("The world has many problems, but not all are political issues being actively considered by government. Agenda building turns problems into issues, which become part of the body of policy questions that government feels it must deal with.").

[412] 52 Fed. Reg. 16050-01 (1987).

[413] Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 614 (D.C. Cir. 1987).

[414] National Congress of Hispanic American Citizens v. Usery, 554 F.2d 1196, 1200 (D.C. Cir. 1977).

Appropriate statutory deadlines hold out some promise of assisting judicial efforts to end unreasonable delay and they could have the same effect for OSHA. Although some courts have been reluctant to enforce statutory deadlines,[425] others have ordered agencies to expedite their efforts because of a statutory deadline.[426] Without a legislative deadline, courts are reluctant to second-guess an agency's proposed timetable, even if it appears to be dilatory.[427] With a legislative deadline, the courts have some congressional guidance with which to evaluate the agency's excuses for delay. Moreover, even if statutory deadlines do not result in strict compliance, they permit a court to insist on more timely compliance than it might feel comfortable enforcing without them.

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[415] Memorandum Opinion at 5 (Dec. 21, 1978) quoted in National Congress of Hispanic American Citizens v. Marshall, 626 F.2d 882, 884 (1979).

[416] National Congress of Hispanic American Citizens v. Marshall, 626 F.2d 882, 889 (1979).

[417] Id. at 890.

[418] Farmworker Justice Fund, Inc., 811 F.2d at 617.

[419] Id. at 618.

[420] 50 Fed. Reg. 415,086, 087 (1985).

[421] 50 Fed. Reg. 42, 660, 662 (1986).

[422] Farmworker Justice Fund, Inc., 811 F.2d at 631-33.

[423] OCCUPATIONAL HEALTH & SAFETY REPORTER 1179 (Apr. 8, 1987).

[424] 29 C.F.R. §1928 (1987).

Statutory deadlines do cause the types of disadvantages pointed out by the critics,[428] but most of those problems can be successfully minimized. Law suits can divert OSHA's resources, but it appears to be a necessary cost if the agency is to be held accountable. Agency employees report that in the past OSHA administrators have refused to decide difficult controversies except, and until, they were subjected to a court order to do so.[429] The field sanitation saga supports this allegation. Moreover, many observers believe that despite all of the problems caused by deadlines at EPA, they generally have caused the agency to move more quickly than without them.[430] Finally, if the agency implements its own priority-setting process, as recommended in our previous report, it should be better able to cope with such litigation. If OSHA has a legitimate priority-setting process, then it will be able to defend its decisions whether or not to expedite a particular standard as requested by a petition.[431]

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[425] See, e.g. Illinois v. Costle, 12 Env't. Rep. Cas. (BNA) 1597 (D.D.C. 1979), aff'd sub. nom. Citizens for a Better Env't. v. Costle, 617 F.2d 851 (D.C. Cir. 1980) (stating that "[t]here is little a court of equity can do" to enforce statutory deadlines against agencies claiming impossibility.).

[426] See, e.g. New York v. Gorsuch, 554 F. Supp. 1060 (S.D.N.Y. 1983) (ordering the EPA to expedite issuance of proposed regulations establishing emission standards for inorganic arsenic under §112 of the Clean Air Act, 42 U.S.C. § 7412 (1982)); Sierra Club v. Gorsuch, 551 F. Supp. 785 (N.D. Cal. 1982) (issuing order scheduling EPA issuance of proposed regulations establishing emission standards for radionuclides under the same statutory provision.); cf. Environmental Defense Fund v. Thomas, 627 F. Supp. 556 (D.D.C. 1986) (holding that OMB could not invoke its authority under Executive Order 12, 291 to delay issuance of EPA regulations beyond deadline established in the 1984 RCRA amendments).

[427] Oil, Chem. and Atomic Workers Int'l. Union v. Zeegler, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (refusing to order Mine Safety and Health Administration (MSHA) to expedite rulemaking to protect underground miners from radon gas, in light of the complex scientific and technical issues involved). The Zeegler court set forth a deferential standard of review in cases seeking to expedite agency action: "The difficulty and uncertainty inherent in the venture caution us against second-guessing MSHA's judgment that its ultimate disposition will be facilitated" by ordering the agency to act more quickly. Id.; see, e.g., UAW v. Donovan, 756 F.2d 162 (D.C. Cir. 1985) (affirming district court decisions to grant three extensions to OSHA beyond original commitment to finish formaldehyde standard); U.S. Steel Workers of American v. Rubber Mfgs. Ass'n., 783 F.2d 117, 1119-20 (D.C. Cir. 1986) (court accepts OSHA's proposed fourteen month schedule as "reasonable").

[428] See supra notes 396-404 & accompanying text.

The Administrative Conference and others believe that the problem of unreasonable deadlines and adverse affects on agency decisionmaking can be mitigated if the agency sets its own deadlines.[432] These observers believe that agency-set deadlines are more realistic because they reflect an agency's understanding of its resource limitations,[433] but they still allow congressional and judicial oversight.[434] Agency-set deadlines, however, could also be more easily manipulated by an agency, by setting unreasonably long-deadlines or by providing liberal escape clauses.[435] Moreover, the courts may not accord agency-set deadlines the same respect that statutory deadlines would command. OSHA now submits schedules to the courts in lawsuits concerning delay, and when OSHA misses those deadlines, the courts generally allow the agency to set a new schedule.[436]

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[429] REPORT ON RULEMAKING PROCEDURES, supra note 14, at 43, 191.

[430] See, e.g. Marcus, supra note 1, at 301 ("What can be said is that though not a panacea, specific goals and timetables at least were partially effective in achieving what Congress intended" for EPA.).

[431] REPORT ON OSHA RULEMAKING PROCEDURES, supra note 14, at 79.

[432] The use of deadlines established by agencies themselves has been endorsed by the Administrative Conference. 1 C.F.R. § 305.78-3 (1987).

[433] Reducing Administrative Delay, supra note 391, at 86; Abbott, supra note 396, at 202.

[434] Supporters contend that agency-set deadlines would be an effective oversight tool for the courts, because they could be used to determine what constitutes "unreasonable delay" under the APA, SENATE COMMITTEE REPORT, supra note 396, at 141, and for Congress, because they could be used to monitor agency progress. See Tomlinson, supra note 136, at 122. Moreover, agencies could be more accountable because if they set their own deadlines, they could not argue that the missed deadline was unrealistic. Abbott, supra note 396, at 201.

3. Recommendations

Without deadlines, OSHA may continue to regulate at its current glacial pace; with deadlines, Congress and the courts have a means of prodding OSHA to regulate more quickly. Any deadlines, however, must be tailored to avoid the problems that have plagued them in the past. Congress should require OSHA to identify its highest priorities for regulation[437] and to establish deadlines for the regulation of each of them. Congress should also require that if OSHA does not comply with a deadline it sets, it must complete the standard within a specified time period thereafter. For example, OSHA could be required to complete a standard within six months after expiration of the deadline it set for that standard.

This type of agency-forcing technique would tell the courts that Congress intends that OSHA keep the deadlines it sets. Moreover, the deadlines should accurately reflect OSHA's own priorities and resources. This system would not work, however, if OSHA attempted to evade accountability by setting unrealistically long initial deadlines. To prevent this possibility, Congress should oversee OSHA's implementation of its requirements. If OSHA did not comply in good faith, Congress should establish the agency's deadlines for it.

Deadlines would be more effective if they were combined with the changes recommended for OSHA's legal mandate.[438] Those recommendations would give OSHA the flexibility to apply different levels of regulation depending on the reliability of the scientific evidence establishing a chemical is harmful. As a result, they should enable OSHA to respond more quickly to any deadlines set for it.

The type of legislation proposed is in the nature of a "procedural hammer" since it forces OSHA to comply with the deadlines it sets for itself. Congress might also consider the use of substantive hammers in appropriate cases. OSHA would be benefited any time Congress resolved a difficult policy issue facing the agency. Congress might be more likely to take such a step if it legislated in the form of a hammer. The hammer technique allows Congress to make a decision, but it also gives the agency an opportunity to modify it. In this manner, Congress can ensure both that a controversy is resolved, and that it is resolved in the most appropriate manner. If the agency does not act, the legislative decision will take effect. If the agency does act, Congress will have forced the agency to resolve the matter expeditiously.

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[435] Reducing Administrative Delay, supra note 391, at 86.

[436] See supra note 417 & accompanying text.

[437] REPORT ON OSHA RULEMAKING PROCEDURES, supra note 14, at 97 (OSHA should establish priorities for regulation).

[438] See supra Part VIII B.2. & accompanying text.

Congress has not been inclined to resolve any of the various regulatory issues under consideration by OSHA. The availability of the hammer technique may not alter this reluctance. Nevertheless, reliance on "hammers" does remove one impediment to legislation which is the concern that Congress lacks the expertise to adopt the most appropriate resolution of some problem.

> **RECOMMENDATION:** Congress should create tighter accountability of OSHA by replacing current statutory deadlines with judicially-enforceable time limits applicable to the entire rulemaking process at OSHA. Congress should permit OSHA to set the deadlines, but it should also require that if OSHA misses a deadline for a standard, it must complete that standard within a specified period of time like six months. Congress can monitor the deadlines that OSHA sets to determine if they are reasonable.

X. Removal of Organizational Barriers

A. NIOSH

OSHA is unique among health and safety agencies in that its research arm is located in another agency. NIOSH conducts research relating to occupational safety and health, prepares criteria documents that describe safe levels of exposure to workplace hazards, and implements educational and training programs.[439] Congress apparently located it in the Department of Health, Education, and Welfare (HEW), which became HHS, because it replaced the Bureau of Occupational Health and Safety, which was already in HEW.[440] At the present time, NIOSH is located in Research Triangle Park, North Carolina.

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[439] 29 U.S.C. §§669-671 (1982).

NIOSH's location in HHS gives it certain advantages in carrying out its functions. Coordination is enhanced with other HHS agencies, such as the National Toxicology Program, the National Center for Disease Control, and the National Institutes of Health.[441] Moreover, NIOSH's location in HHS probably assists in the recruitment and retention of health scientists. Since HHS is primarily a research organization, scientists apparently consider it to be a more congenial institutional home.[442]

At the same time, NIOSH and OSHA have significant coordination problems,[443] which are attributable to two causes. First, OSHA does not have a sufficient number of health professionals to review NIOSH work in depth. As a result, OSHA employees find that "OSHA-NIOSH relations are 'close to non-existent,' at the working level"; NIOSH employees agree that the "staff at OSHA is 'too small for the job.'"[444] Second, no administrator is in a position to resolve disputes between the two organizations. The Secretary of Labor has no authority over NIOSH and the Secretary of HHS has no authority over OSHA. Coordination therefore either requires the two agencies to agree or the intervention of both Secretaries. NIOSH and OSHA are unlikely, however, to elevate their disputes to that level of their respective departments. As a result, the two agencies coexist in a uneasy, and sometimes unproductive, relationship.

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[440] S. Rep. No. 1282, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5196-97. The idea to establish NIOSH originated in the Senate after the House had passed the Occupational Safety and Health Act. The House agreed to the Senate's provisions in the conference committee. Conference Report 1765, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5240.

[441] See OVERSIGHT HEARINGS ON THE OCCUPATIONAL SAFETY AND HEALTH ACT BEFORE THE SUBCOMM. ON MANPOWER, COMPENSATION, AND HEALTH AND SAFETY OF THE HOUSE COMM. ON EDUCATION AND LABOR, Part 2, 94th Cong., 2nd Sess. 267 (1976) (Testimony of Dr. John Finklea, Director, NIOSH) (NIOSH has available to it the resources of HHS agencies such as Center for Disease Control).

[442] T. GREENWOOD, supra note 131, at 116.

[443] See T. GREENWOOD, supra note 131, at 118 ("The lesson appears to be that such complete organization separation of functions [between OSHA and NIOSH] is counterproductive."); Rothstein, supra note 106, at 653 ("Both NIOSH and OSHA officials indicated disapproval of the priorities and policies of the other agency); REPORT ON RULEMAKING PROCEDURES, supra note 14, at 14 (OSHA officials contend that NIOSH is not helpful); id. at 64-65 (NIOSH officials contend OSHA is unresponsive).

[444] See Rothstein, supra note 106, at 653 (citing interviews of OSHA and NIOSH employees).

If NIOSH were transferred to the Department of Labor, the Secretary of Labor would be in a position to reconcile the goals and priorities of the two agencies and NIOSH research efforts could be coordinated with OSHA's priority-setting process.[445] Moreover, OSHA employees could seek advice from NIOSH scientists when health and safety rules are being planned. One of the significant limitations on OSHA productivity is the small size of its scientific staff, and the Directorate of Health Standards is particularly understaffed.[446] Although such consultation is also possible at the moment, it would be more likely to occur if NIOSH were located in the same city and building as OSHA.

A change in location would also help end duplicative activities. NIOSH publications are widely distributed and serve as an important source of reference on occupational hazards and controls,[447] but OSHA does not consider them adequate for standard-setting purposes. OSHA also engages in training and education and this report recommends that it continue and expand that activity.[448] If OSHA and NIOSH had a closer working relationship, NIOSH could take the lead in training and education and OSHA might be able to conserve resources for its regulatory activities.

Better OSHA-NIOSH coordination is more important than the advantages of having NIOSH in HHS. While coordinating the government's research efforts is certainly important, the resolution of the standard-setting problems at OSHA is a more pressing need. Additional and better research about occupational and safety will be wasted if OSHA is unable to act on the information that is generated. Therefore:

> **RECOMMENDATION:** Congress should relocate the National Institute of Occupational Safety and Health (NIOSH) to the Department of Labor to

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[445] See T. GREENWOOD, supra note 131, at 123 ("Research whose budget and priorities are set independently of the agenda and needs of its client (sic) regulatory program can tend toward unresponsiveness and even irrelevance from the perspective of the regulators.").

[446] See supra Part IIG (OSHA, and particularly the Health Standards Directorate is serious understaffed).

[447] PREVENTING INJURY, supra note 4, at 270.

[448] See supra Part III.B.

permit the Secretary of Labor to coordinate effectively NIOSH and OSHA.

B. OSHRC

OSHA is burdened with another organizational problem. The Occupational Safety and Health Act of 1970 divided regulatory responsibility between OSHA and OSHRC according to a "split-enforcement" arrangement. OSHA, which is in the DOL, was assigned the responsibility for promulgating health and safety standards and for enforcing these standards through inspections and filing complaints against employers.[449] OSHRC was assigned the responsibility for adjudicating such complaints.[450] At OSHRC, complaints are adjudicated initially by an ALJ and can be reviewed by a three-member Commission.[451]

When Congress was debating the creation of OSHA, industry opposed a traditional arrangement which would have placed the rulemaking, enforcement, and adjudicatory functions in OSHA.[452] In the traditional arrangement, separation of functions is achieved through internal insulation of employees who perform different functions and through ex parte contact prohibitions that protect ALJs.[453] The agency administrator, however, is responsible for all three functions.[454] Industry objected that it would be impossible to achieve evenhanded justice if the OSHA administrator supervised all three activities,[455] and the split-enforcement model was adopted as a compromise.[456]

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[449] 29 U.S.C. at §§655(b), 657, 658-59.

[450] 29 U.S.C. at §661.

[451] 29 U.S.C. at §661(j)1.

[452] Johnson, Report for the Administrative Conference, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experience, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 297 (1986).

[453] See 5 U.S.C. §554(d) (1982).

[454] See R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 282, at §9.3.6.

1. **Standards, Statutes, and Enforcement Policies**

A recent study for the Administrative Conference found that the split-enforcement arrangement creates unnecessary conflicts, because Congress failed to specify clearly the respective responsibilities of the two agencies. The study also found that the circuit courts have expressed considerable confusion over which agency is entitled to the greater deference when they disagree.[457] Some courts have held that OSHA's interpretation of its own health and safety standards should be given deference;[458] others have held that OSHRC's interpretation should receive deference;[459] and still others have held that neither agency should receive deference.[460] Both the courts that defer to OSHA, and those that do not, claim to be supported by the relevant legislative history.[461] They also disagree over whether OSHRC has the expertise to interpret standards and otherwise establish policy.[462]

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[455] See M. ROTHSTEIN, supra note 200, at §341 (business fearful of delegating both enforcement and adjucatory functions to OSHA); Tomlinson, supra note 136, at 10-11 (tripartite model endorsed by business interests); see generally, Currie, OSHA, 1976 AM. B. FOUNDATION RESEARCH J. 1107, 1160 (The most attractive feature of the split enforcement model is that "[t]he creation of a separate quasi-judicial agency removes the appearance of an improper commingling of the functions of prosecutor and judge.")

[456] See Johnson, supra note 452, at 297-98; Martucci, The Defense of Economic Infeasibility In Enforcement Proceedings Under the Occupational Safety and Health Act: An Appraisal of the Decisions of the Occupational Safety and Health Review Commission, 17 N. ENG. L. REV. 3, 13 (1981).

[457] Johnson, supra note 457, at 318.

[458] See, e.g., Brock v. Schwartz-Jordan, Inc., 777 F.2d 195, 197 (5th Cir. 1985) (OSHA's interpretation of term "more than 10 feet above the ground floor" in safety standard given deference); Donovan v. Amorello & Sons, Inc., 761 F.2d 61, 65 (1st Cir. 1985) (OSHA's interpretation of term "obstructed view" in safety standard given deference).

[459] Brock v. Bechtel, 803 F.2d 999, 1000 (9th Cir. 1986) (OSHRC gets deference to determine if barricade regulation was intended to restrain or merely to warn employees).

[460] See, e.g., Donovan v. Anheuser Busch, 666 F.2d 315, 325-26 (8th Cir. 1981) (where OSHA and OSHRC have no consistent interpretation concerning the meaning of "platform" in a safety standard, a court need not defer to OHSRC, but may look to language, purpose, and history of act to resolve issue).

ACUS recommended that when Congress establishes a split-enforcement arrangement, it should clarify which agency has programmatic responsibility and it should direct the courts to give deference to that agency. More specifically, ACUS recommended that in adjudicatory challenges to standards promulgated pursuant to rulemaking, the adjudicatory agency should give deference to the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with law.[463]

The ACUS recommendation, however, arguably does not go far enough, because the existing confusion extends beyond the interpretation of standards. The courts are also split over which agency should receive deference concerning interpretation of the Occupational Safety and Health act itself,[464] and over which agency should control various procedural aspects of enforcement proceedings.[465]

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[461] Compare Donovan v. Amorello & Sons, Inc., 761 F.2d 61, 65 (1st Cir. 1985) (legislative history indicates deference for OSHA); Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1182 (3rd Cir. 1980) (legislative history indicates deference for OSHA) with Brennan v. Gilles & Cotting, 504 F.2d 1255, 1262 (4th Cir. 1974) (legislative history indicates deference for OSHRC).

[462] Compare Brock v. Schwartz-Jordan, Inc., 777 F.2d 195, 197 (5th Cir. 1985) (OSHA's interpretation, as promulgator of regulations, is given great weight by reviewing court); Donovan v. Amorello & Sons, Inc., 761 F.2d 61, 66 (1st Cir. 1985) (OSHA has expert knowledge because of its legislative and enforcement functions, while OSHRC has more limited expertise gained only from adjudicating citations) with Marshall v. Cities Service Oil Co., 577 F.2d 126, 130 (10th Cir. 1978) (OSHRC has expertise in job safety); Brennan v. Gilles & Cotting, 504 F.2d 1255, 1262 (4th Cir. 1974) (Congress required Commissioners to be qualified by "training, education, and expertise.").

[463] 1 C.F.R. §305.86-4 (1987).

[464] See, e.g., Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1184 (3rd Cir. 1980) (OSHRC has no active party status in circuit court and no rulemaking or policy role in administering the act); Breenan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262 (4th Cir. 1974) (Commission's definition of the term "employer" under §5(a) given deference).

2. General Duty Clause

Another important source of conflict concerns whether OSHRC can, and should, determine health and safety policy for cases brought under the general duty clause.[466] A recent case amply illustrates this problem. Kastalon, Inc. reviewed OSHA's citation of two employers for a violation of the general duty clause for exposing employees to 4,4'-Methylene bis (2 choronaniline), which is commonly called MOCA.[467] Although expert witnesses for both OSHA and the companies agreed that MOCA was a suspected carcinogen,[468] the Commission dismissed the citations because OSHA had failed to prove that MOCA posed a "significant risk."[469]

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[465] See, e.g., Donovan v. OSHRC, 713 F.2d 918, 930 (2nd Cir. 1983) (OSHRC cannot remand settlement by the Secretary because it has no direct policy making function); Donovan v. United Transportation Union, 748 F.2d 340, 346 (6th Cir. 1984) (OSHRC's interpretation of union's right to intervene after Secretary withdraws a citation not overturned if reasonable and consistent with the Act); UAW v. OSHRC, 557 F.2d 607, 611 (7th Cir. 1977) (Commission gets deference regarding a decision to grant a time extension for compliance with the noise standard even though OSHA opposed the extension.); see also DOL Says Simplified Proceedings Would Threaten Enforcement of OSH Act, OCCUPATIONAL SAFETY & HEALTH REP. (BNA) 5 (Apr. 5, 1987) (OSHA claims OSHRC's new procedural rules would "serious affect" OSHA's ability to enforce the Occupational Safety and Health Act).

[466] See Sullivan, Independent Adjudication and Occupational Safety and Health Policy: A Test For Administrative Court Theory, 31 AD. L. REV. 177, 183-194 (1979).

[467] 1986 O.S.H. Dec. (CCH) ¶27,643, at 35,970 (July 23, 1986).

[468] Id. at 35,974.

Dr. Scriber, OSHA's expert in chemical carcinogenesis, had performed a quantitative risk assessment of MOCA by extrapolating the risk to humans from a dog study in which all six animals given MOCA had died from cancer. As part of his analysis, Scriber has assumed that MOCA posed the same risk to humans as dogs and that MOCA and benzidine, another carcinogen, had similar effects on humans.[470] The Commission rejected this evidence because the employer's expert disagreed with the validity of those two assumptions and because he believed that quantitative estimates of risk to humans could not be made with any reasonable degree of scientific certainty from animal studies.[471] The Commission also claimed that OSHA had in effect admitted that such estimates were unreliable when it explained the difficulties of extrapolating the risk to humans from animal studies in its Cancer Policy.[472]

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[469] OSHA had argued that the concept of "significant risk" was subsumed in its burden of proof under the general duty clause to prove a hazard was "recognized." OSHA contended that the recognition requirement "'encompasses notions of what workplace conditions reasonably prudent persons believe should be guarded against,' and thus assures that conditions that do not present a significant risk would not be subject to [a general duty]." Id. at 35,975. The Commission disagreed because "[t]he mere fact that employers take certain precautions does not prove that those precautions are required by an occupational safety or health standard or by the general duty clause." Id. It noted that it and the courts had "consistently held it would be inappropriate to base a finding that a hazard exists solely on evidence that an employer has taken certain precautions . . . ." Id.

The Commission also noted that Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317, 323-24 (5th Cir. 1984) held that the significant risk test should not be applied in enforcing the general duty clause. Id.; see notes 240-48 & accompanying text (discussion of general duty clause and significant risk test). But the Commission reiterated its contrary view that such evidence was necessary. Id.

The Commission's decision establishes a higher burden of proof for OSHA than the Benzene case intended.[473] Benzene held that OSHA must have quantitative evidence of significant risk, but it also held that the agency was to receive deference concerning the interpretation of any data it produced.[474] The plurality said that OSHA was not required to prove significant risk with "anything approaching scientific certainty" and that it could use "conservative assumptions" in interpreting data, "risking error on the side of overprotection rather than underprotection."[475] The Commission did exactly what the Supreme Court prohibited. It required OSHA to prove significant risk with something approaching scientific certainty and it objected to the fact that OSHA's expert made conservative assumptions which risked error on the side of overprotection rather than underprotection.

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[470] Scriber testified concerning how he extrapolated the results of an animal study in which all six dogs fed MOCA developed cancer. First, he assumed the amount of MOCA to which a person was exposed was about 3,000 times the amount excreted in a person's urine. This assumption was based on a MOCA rat study by the NIOSH that showed that rats excreted about 0.03% of the MOCA they consumed. Dr. Scriber noted that this was approximately the same as the percentage of benzidine that a human excreted when that chemical was applied to the skin and that MOCA and benzidine were about equally potent in producing cancer in dogs. Id. at 35,978. Second, he assumed that a person would excrete 50 micrograms of MOCA per day. Id. There was evidence that workers at one of the plants were excreting 100 to 620 micrograms per liter of urine. Id. at 35,973. Third, he calculated that if a person would work 250 days a year for 39 years, he or she would receive a total dose of MOCA of 14 grams per kilogram of body weight. Id. at 35,978. Fourth, since all six dogs developed cancer when fed a total of 14 grams of MOCA per kilogram of body weight, he postulated that workers would be at a 100% risk of contracting cancer after 39 years.

[471] Id. at 35,978-79.

[472] Id. at 35,979. OSHA, however, concluded that since the exact danger to workers was difficult to compute, the prudent course was to reduce risk to the extent that was feasible. See supra notes 220 & accompanying text. OSHRC, by comparison, concluded that nothing should be done to protect workers. See supra note 476 & accompanying text.

[473] 448 U.S. at 652-53; see supra notes 219 & accompanying text (plurality objected to OSHA's attempt to avoid entirely quantitative risk assessment).

[474] Note 221 & accompanying text.

The applicability of Benzene to the general duty clause, however, is not clear. The split-enforcement arrangement establishes OSHRC, not OSHA, as the agency responsible to determine whether the clause has been violated. For that reason, the circuit courts have given OSHRC deference for its decisions interpreting the scope of employer's duties under the clause.[476]

If Kastalon, Inc is affirmed, OSHA will be rendered powerless to protect workers from carcinogens under the general duty clause. The Commission's position seems to be that quantitative extrapolations from animal data are too speculative to provide useful estimates of human risk.[477] Since OSHA usually does not have scientific data of human experiences with chemicals,[478] the Commission's decision will prevent OSHA from regulating carcinogens under the general duty clause in most cases. The Commission's wrong-headed position is not surprising. The prediction of human risk from animal data requires scientific and policy expertise.[479] The Commission, composed of three lawyers, has neither.

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[475] Id. at 656.

[476] See, e.g. Marshall v. Cities Service Oil Co., 577 F.2d 126, 130 (10th Cir. 1978) (OSHRC's decisions under the general duty clause are to be affirmed unless they are arbitrary, capricious, or otherwise not in accordance with law). One court explained:

> Citations . . . for violations of the general duty clause involve administrative adjudications rather than rulemaking and petitions for review in general duty clause cases involve more or less traditional standards for reviewing adjudications under a statute. Section 11(a), 29 U.S.C. §660, states that we must afford the same deference as to the fact-finding of such agencies as the National Labor Relations Board.

Brennan v. Occupational Safety and Health Review Comm'n., 502 F.2d 946, 950-51 (3rd Cir. 1974).

[477] See 1986 O.S.H. Dec. (CCH) ¶27,643, at 35,979.

[478] Responses to Occupational Disease, supra note 2, at 1233.

Kastalon, Inc. is inconsistent both with the preventative purposes of the Occupational Safety and Health Act and with the Benzene decision.[480] But even if it is overturned on appeal, the case demonstrates how the split-enforcement model hobbles OSHA's authority. It has spawned countless disagreements between OSHA and OSHRC which require OSHA to spend its limited resources constantly litigating to preserve the policies it would like to establish. At the same time, employers and employees are subjected to endless confusion concerning their respective rights and liabilities.

3. Conclusions

Congress has two options to avoid the problems created by the split-enforcement model. One is to restrict OSHRC's function to fact-finding. Under this approach, OSHRC would have de novo authority for this function and it would be affirmed if it was supported by substantial evidence. As to policy and legal decisions, Congress could require OSRHC to give OSHA deference. Under this approach, OSHRC would determine whether OSHA's policy and legal conclusions were arbitrary or capricious, or otherwise not in accordance with law. The second option would be to move the enforcement authority into the Department of Labor. An ALJ would hear enforcement actions and write an initial decision. The decision would be final unless the Assistant Secretary chose to review the case.

The first option would have the benefit of fact-finding by an independent agency, but maintaining OSHRC only for that purpose is unnecessary. Fairness can be adequately guaranteed under the traditional model. ACUS recently concluded that the traditional model "appears, on the whole, to have worked satisfactorily in providing fair and impartial factfinding, while permitting the agency to speak with a single voice on law and policy."[481] Moreover, Congress could specifically require OSHA to separate its functions to guarantee fairness. Internal barriers could be required to insulate employees who worked on the adjudication of citations from those who investigated and prosecuted those citations. For example, lawyers who advised the Assistant Secretary concerning enforcement matters would be prohibited from discussing cases with other lawyers who sought to enforce citations. In addition, Congress could extend the prohibitions on ex parte contacts now in the APA to include the Assistant Secretary of Labor for OSHA.[482] This would guarantee the independence of the ALJ in writing his or her initial decision.

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[479] See McGarity, supra note 8, at 731-49; Scientific Issues, supra note 6, at 292.

[480] See supra note 475 & accompanying text (Supreme Court allows OSHA to act in a preventative fashion).

C. **Advisory Committees**

OSHA is authorized to have a permanent advisory committee, NACOSH, and temporary committees for rulemaking proceedings.[483] In 1976, OSHA stopped appointing rulemaking advisory committees, and none have been used since that date.[484] Other agencies, particularly FDA, have had better experiences with advisory committees.[485] The difference between the performance of FDA committees and those at OSHA seems attributable, at least in part, to the difference in the legal requirements that apply at each agency.

Membership of OSHA committees, which is composed of fifteen or fewer persons, must include at least one designee of the Secretary of Health and Human Services, at least one representative of state health and safety agencies, and an equal number of representatives from labor and management. OSHA can appoint other persons with expertise in the area of occupational health and safety, but the number of such persons cannot exceed the number appointed to the committee as representatives of federal and state agencies.

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[481] 1 C.F.R. §305.86-4, at 193 (1987). The Conference, however, took no position on whether the split-enforcement model should be abolished because it was "unable to conclude whether [the split-enforcement] model achieves greater fairness in adjudication that does the traditional structural model." Id. Since fairness can be guaranteed under the traditional model as well, we conclude that the split-enforcement model creates too many problems to merit its retention.

[482] See R. PIERCE, S. SHAPIRO, P. VERKUIL, supra note 282, §9.3.6, at 504_ (proposal to prohibit agency administrators from conferring with ALJs).

[483] See supra Part IV.B.1.

[484] See supra Part IV.B.2.

[485] See supra notes 148-52 & accompanying text.

Policy attitudes may play a less overt role in selecting members of FDA committees. They are required to be experts in scientific areas relevant to the committee's responsibilities, they are subject to strict conflict-of-interest rules, and they must be balanced according to their scientific views.[486] Like OSHA, FDA committees do have representatives from interested parties, but they are nonvoting members.[487] Since FDA committees are composed of independent experts, FDA better avoids the type of adversarial atmosphere that has plagued OSHA and many decisions are by consensus.[488]

Although superior to OSHA's arrangement, the operation of advisory committees at FDA and other agencies is hardly perfect. A recent report for ACUS identified several problems at FDA including inadequate preparation by committee members, the appointment of members who do not have expertise relevant to decide a matter, and the failure to committees to identify clearly the basis of the conclusions that they reach.[489] Moreover, because FDA is a licensing agency, it may be easier to obtain cooperation between the members of advisory committees.

Despite their limitations, Recommendation 82-5 of the Administrative Conference endorsed the use of expert advisory committees for "[p]eer review of experimental findings and scientific judgments. . . ." The Conference discussed how such committees such be constituted, and, among other recommendations, it suggested that "[m]embers of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields," that panel members with an interest in a particular matter should not participate in the panel's discussions, and that "[a]ll panel conclusions and recommendations should be reduced to writing and become a part of the material to be considered in any ensuing administrative proceding."[490]

Congress should amend the Occupational Safety and Health Act to authorize OSHA to create an advisory committee system that would follow Recommendation 82-5. Existing membership restrictions should be eliminated and replaced with a simple requirement that OSHA advisory committees be "balanced." Existing deadlines place on these committee should be eliminated in favor of the types of deadlines recommended earlier in this report. Finally, Congress should also address the problem of accountability of these committees. Committees should be required to present a complete and full accounting of their deliberations including an explanation of each potential solution to an issue, which solution the committee recommends, and why that solution is preferable.

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[486] See supra note 149 & accompanying text.

[487] See id.

[488] See supra note 156 & accompanying text (FDA advisory committees usually operate by consensus).

[489] Scientific Issues, supra note 146, at 330-331.

[490] Recommendation 82-5, supra note 127.

> **RECOMMENDATION:** Congress should amend the Occupational Safety and Health Act to remove current restrictions on rulemaking advisory committee membership and the deadlines applicable to OSHA's use of the committees. Membership restrictions should be replaced with a simple requirement that Advisory be "balanced." Congress should ensure the accountability of such committees by requiring them to present a full accounting of their deliberations, including an explanation of each potential solution to a problem, which solution the committee adopts, and why that solution is preferable.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-11

APPEALING GOVERNMENT CONTRACT DECISIONS: REDUCING THE COST AND DELAY OF PROCUREMENT LITIGATION

by

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APPEALING GOVERNMENT CONTRACT DECISIONS: REDUCING THE COST AND DELAY OF PROCUREMENT LITIGATION

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I

INTRODUCTION

Within the government contracts community, a small but promising movement has begun away from a perilous trend toward red tape, proceduralism, and intolerable delay. Most contractors, agency officials, government attorneys, auditors, inspector generals and administrative judges agree that government contract appeals have become too complicated, too expensive, and too time-consuming.

As with most federal programs, problems stem from more than a single source. The factors range from contracting officers' lack of authority to overloaded boards of contract appeals and political and organizational failures. Despite Congress' declared goals in the Contract Disputes Act of 1978 ("CDA")[1] to provide an expeditious alternative to court litigation by encouraging negotiated settlement,[2] appeals are now rarely resolved expeditiously or inexpensively in any forum.

Today's appeals system is cumbersome for a number of reasons. Many contracting officers' fears of being second-guessed by superiors, auditors, congressmen or the press significantly reduce incentive to take sensible steps to settle a complex or controversial problem. Not surprisingly, this uncertainty can cause some contractors to prefer simply to appeal a decision rather than waste their time negotiating a tenuous settlement. Increasingly, management problems are handed over to lawyers and accountants to be resolved by criteria that are often only marginally relevant in forums hardly designed for efficiency. One result is an ever-increasing caseload at many appeals boards. Most notably, the active docket of the Armed Services Board of Contract Appeals, has virtually doubled since 1979[3] without a concomitant increase in manpower. A common complaint is that the boards, themselves originally created as a sort of "ADR," have become too "judicialized."[4] With depositions, discovery and opinion writing, it is virtually impossible to avoid the burdens of traditional litigation[5] - - the very situation the Boards were created to avoid.

Interest in improving resolution of contract disputes has risen steadily since 1972, when the congressionally-created Commission on Government Procurement recommended that an informal conference be instituted before any appeal by the contractor to review contracting officer decisions adverse to the contractor[6]. A subsequent policy directive of the Office of Federal Procurement Policy encouraged informal discussions "before issuance of a contracting officer's decision on a claim, ...to the extent feasible, by individuals who have not participated substantially in the matter in dispute, [to] aid in the resolution of differences by mutual agreement."[7]

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[1] Indeed, some would say, *because* of the Act.

[2] S. Rep. No. 1118, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235 ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation....").

[3] Williams, *A Brief Look at the Armed Services Board of Contract Appeals*, 22 Public Contract Newsletter 3, 17 (1986) (1,221 cases in 1979 grew to 2,074 by the end of 1985).

[4] Spector, *The Contract Disputes Act of 1978 - Some Observations and Predictions*, 39 Fed. B.J. 1 (1980).

[5] *See e.g.*, Eldon Crowell, remarks at Admin. Conf. Colloquium, *Improving Dispute Resolution: Options for the Federal Government*, Panel on Government Contract Disputes, June 1, 1987, 1 Admin. L.J., 339, 553 (1987) (hereinafter *ACUS Colloquium*).

It is in this spirit that in the mid-1980s a few agencies began experimenting with several alternative means of dispute resolution ("ADR"), including minitrials, mediation and settlement conferences. These methods are consistent with the goals of the CDA and have proven to be efficient and fair ways to resolve a variety of contractual and other private disputes. One way agencies accomplish this is to involve decisionmakers, rather than their representatives, in the conflict resolution process.

This study focuses on the actual and potential application to contract appeals of the ADR methods most commonly used, particularly the minitrial. It is not the purpose of this study to reverse the recent trend toward judicialization, but to explore the uses of one possible set of options to help reduce the formality of some proceedings. Even given an impressive success rate in the relatively few cases where ADR has been used to date, it would be naive to suggest that ADR methods are panaceas, or that they will work in most contract appeals. Their use presents serious, unresolved issues in some cases. Nevertheless, we can benefit from examining agencies' experiences, seeking to describe what happened and why, exploring some of the practical and legal questions raised, and recommending procedures to make life easier and more productive for those who do choose to engage in ADR.

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[6] This review would have been conducted at the request of the contractor by a high-level agency official who had not previously been involved in the claim. Although the draft versions of both the House and the Senate contained this provision, it was dropped from the Act at the last minute. Senator Byrd explained that "It is still the policy of Congress that contractor claims should be resolved by mutual agreement, in lieu of litigation, to the maximum extent possible. [But the provision was dropped because of concerns that] contractors will use this statutory authority for a meeting with supervisors of the contracting officer to undermine the negotiating position of the contracting officer." Cong. Rec., Oct. 12, 1978, at S18641.

[7] 45 Fed. Reg. 31035 (May 9, 1980). *See also* Federal Acquisition Regulation (FAR) § 33.204.

II

CONTRACT APPEALS: A BRIEF LOOK AT THE LANDSCAPE

A. Background: The Growth of Contract Appeals

Today's system for handling contract disputes has origins in much earlier times with simpler problems and processes. In 1855, the first general legislation was enacted permitting monetary claims against the federal government in a newly created Court of Claims.[8] During the Civil War, Secretary of War Simon Cameron appointed a board--probably the first such--to hear and decide certain claims under ship construction contracts awarded by a chief quartermaster who was found to have committed fraud against the government.[9] Subsequently, many government contracts explicitly allowed contractors to appeal a government contract official's decision to the agency head.

The first formal appeal procedures were established in the aftermath of World Wars I and II. A Board of Contract Adjustment was established in the War Department in 1918 to resolve contract disputes which had not been disposed of by mutual agreement. Comprised of seven army officers and fifteen eminent civilian attorneys,[10] the Board conducted trial-type hearings in some cases, complete with verbatim transcripts. Before dissolution early in 1922, this Board and its successor disposed of over 3,000 cases.[11] Secretary of the Navy Josephus Daniels was not a lawyer, unlike the Secretary of War Newton D. Baker, and took a considerably different approach at about the same time when he established a Compensation Board to avoid "conducting interviews and hearings which were taking considerable of his time and patience."[12] The Navy Board emphasized use of naval officers experienced in engineering, management and accounting "with sufficient rank and experience to command the respect of senior officials of contractors."[13] This Board of technical experts operated continuously, until replaced by the Navy Department Board of Contract Appeals in 1944 and ultimately subsumed into the Armed Services Board of Contract Appeals in 1949.[14]

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[8] The Court (now the U.S. Claims Court) has continuously had jurisdiction over contract, and other, claims ever since, first as a place of appeal from agency decisions and now more or less on a par with the agency boards of contract appeals. Much of the early history described herein is set forth in considerable detail by Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Boards of Contract Appeals*, 29 L. and Contemp. Prob. 39 (1966) (hereinafter *Disputes and Appeals*).

[9] The three-commissioner board went to the Western Military District, examined proofs of claims, and made recommendations to the Secretary on all claims where payment had been suspended. The Secretary's authority was upheld in 1868, when the Court of Claims refused to entertain a claim for the unpaid balance on the contractor's initial claim following payment of a part at the commissioners' recommendation. See *Adams v. U.S.*, 2 Ct. Cl. 70 (1866), *affd.* 74 U.S. 463 (1868), which upheld the Secretary's authority to appoint a board, with the proviso that claimants had the option whether or not to consent to use a board.

[10] Civilian members' salaries were $7,500 per year, then equal to those of Senators and Congressman and more than judges of the Court of Claims received.

[11] According to Professor Wigmore, the Board's opinions were "models of clarity." J. Wigmore, *Evidence* § 4(c), at 74 (3d ed. 1940).

[12] Report for Under Secretary of War dated May 28, 1942, *see Disputes and Appeals* 46.

[13] *Id.*

[14] For a detailed look at the creation of the ASBCA, *see Disputes and Appeals* 50-60.

The number and size of government contracts continued to grow in the post-WWII period, as did their importance to the nation's economy; additional agencies began establishing boards both to lighten the burden on top officials and to give contractors an option of avoiding the cost and delay of the courts. Without any authorizing legislation, nearly a dozen agencies had created boards by the early 1960's.[15]

Until the early 1960's, proceedings before the boards of contract appeals were informal and relatively expeditious. In most cases, there was little or no discovery, and the hearings were conducted more on the model of arbitrations than court trials. Members of the government contracts bar usually presented a scaled-down version of their case before the boards, assuming that if the contractor lost at the board level, they would be able to obtain a full-scale de novo trial on the merits before the U.S. Court of Claims.

The Supreme Court put a halt to this practice with its 1963 decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, in which the Court held that findings of fact by the boards of contract appeals on disputes arising under the contract were final and binding, subject only to judicial review on the administrative record in the Court of Claims. The Court ruled that a de novo hearing on the merits would no longer be available in the Court of Claims, and that the boards were thus the sole forum for trying disputes arising under the remedy-granting clauses of the contract.[16] Under a later decision in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the Court held that the Court of Claims would continue to be the exclusive forum for contractor claims based upon breach of contract.

In the wake of *Bianchi* and *Utah Construction*, the boards took on a far more significant role in the resolution of government contracts disputes. This led to pressure by the government contractors' bar to "judicialize" procedures before the boards in an effort to obtain procedural due process. As a result, the boards changed their procedures to permit written and deposition discovery, and the hearings on the merits became more formalized and extensive. Caseloads and backlogs increased, disputes became more heavily lawyered, and discovery and motions practice were introduced and expanded. More and more decisions took longer to be reached, and read. Many applauded these trends as enhancing contractors' due process rights; other viewers decried them as inducing delay, bureaucratic irresponsibility, and litigation expenses.[17]

Whatever the merits of these various viewpoints, in 1978 the judicialized model of claims resolution prevailed with the enactment of the Contract Disputes Act ("CDA"), due in large part to a few court decisions finding broad due process rights and agitation by some private bar and board members.[18] Among other things, the Act gave the boards a statutory basis, enhanced the independence and authority of board judges (as well as the finality of their decisions), and prescribed exclusive dispute resolution procedures.[19]

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[15] Administrative Conference of the United States, Statistical Data Relating to Administrative Proceedings Conducted by Federal Agencies, Classified Index 78-79 (1962).

[16] Spector, *Is It "Bianchi's Ghost" or "Much Ado About Nothing"?*, 29 Law & Contemp. Probs. 87 (1964).

[17] Spector, *Public Contract Claims Procedures - A Perspective*, 30 Fed. B.J. 1 (1971).

[18] Crowell, remarks at *ACUS Colloquium*, Panel on Government Contract Disputes.

[19] These are discussed briefly in Section II.C.2, *infra*.

B. The Current Rules: The Contract Disputes Act

Background. The Contract Disputes Act of 1978[20] was intended to bring greater consistency, fairness, and efficiency to the resolution of disputes arising out of government contracts.[21] The legislation reflected in large part the recommendations of the Commission on Government Procurement, created by Congress in 1969 to recommend improvements in the procurement process.[22]

Agency Procedures. The statutory system established by the Contract Disputes Act, and applicable to all agencies, begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the contracting officer. The contracting officer has a dual role; not only to represent the government as a party to the contract, but also (subject to certain decisional safeguards) to make the decisions on claims.[23] If the dispute is not amicably resolved, the CDA requires the CO to issue a written decision on the claim, stating the reasons for the decision and informing the contractor of available appeal rights.

A contractor dissatisfied with a contracting officer's decision on the claim may appeal the decision either to an agency board of contract appeals or to the U.S. Claims Court. The proceedings become more formal at this stage of the dispute. The contractor may then appeal the decision of either body to the U.S. Court of Appeals for the Federal Circuit.[24]

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[20] 41 U.S. Code §§ 601-613; 5 U.S.C. § 5108(c)(3); 28 U.S.C. §§ 1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517; 31 U.s.c. § 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383; significantly amended April 2, 1982 by Pub. L. No. 97-164, title 1, §§ 156-157, 160, 161, 96 Stat. 25, 47-49.

[21] Much of the following discussion is drawn from the Administrative Conference's *Federal Administrative Procedure Sourcebook* (hereinafter *Procedure Sourcebook*), Chapter 5 (1985). Other useful sources include Crowell, Johnson & Boyd, The Contract Disputes Act of 1978 (Federal Publications, 1979); and Cibinic and Nash, *Government Contract Claims* (1981).

[22] Efforts to pass contract disputes legislation began after the Commission on Governmental Procurement issued its final report and recommendations and succeeded in October of 1978. H.R. 11002 was introduced by Representatives Harris (D. Va.) and Kindness (R. Ohio) on February 20, 1978 and reported favorably by the House Judiciary Committee without hearings. (The Commission had held hearings on similar legislation the previous year.) The House passed the bill on September 26, 1978. A similar Senate bill, S. 3178, was introduced by Senators Chiles (D. Fla.), Packwood (R. Ore.), Heinz (R. Pa.) and DeConcini (D. Ariz.) on June 7, 1978 and favorably reported, with amendments, by the Committees on Governmental Affairs and the Judiciary. The Senate took up floor consideration of the bill on October 12, agreeing to amendments that exempted the Tennessee Valley Authority from certain of the Act's requirements, added the requirement that claims of $50,000 or more be certified, deleted a requirement that an informal settlement convergence be afforded contractors, and changed the standard of judicial review of contract appeals board decisions from "clearly erroneous" to "substantial evidence," among other things. The Senate then passed H.R. 11002, amended to contain the amended provisions of S. 3178, and the House agreed to the Senate-passed version the next day.

Perhaps because it was passed quickly, at the end of the legislative session, the Contract Disputes Act (including the Senate amendments to it) was not the subject of extensive debate. However, the Congressional Record for October 12 does include a brief explanation of the amendments agreed to on the floor (95 Cong. Rec. 36261-68).

[23] The term "claim" is not defined, but includes disputes arising during contract performance (involving, for example, the interpretation of contract terms or requests for equitable adjustments to the contract price) and claims for breach of contract. It does not include bid protests or proceedings for the debarment or suspension of government contractors.

Other Provisions. In addition to establishing a single comprehensive law covering the contract disputes process for almost all government contracts (some remain outside the scope of the law), the Contract Disputes Act made several other important changes in existing law. The Act, for the first time, gave a statutory basis to the boards of contract appeals ("BCAs")[25], expanded their jurisdiction, gave them subpoena power, and authorized them to grant any relief within the authority of the Claims Court. The CDA added new requirements for the selection of contract appeals board members, intended to enhance the quality and independence of the boards.[26] It also directed the Office of Federal Procurement Policy to issue guidelines for the establishment and procedures of agency contract appeals boards.[27]

C. Surveying the Disputes Landscape: Why, What, and How?

1. Why So Many Disputes? A variety of factors have served to increase the incidence of controversies that remain unresolved between the parties. These included:

⊕ Historical reasons, such as growing impact of government contracting;[28] increased complexity of contracts; new auditing and other regulatory requirements; and an expanded notion--perhaps overexpanded--of necessary due process rights.

⊕ More and more contractors have come to be dependent on government for their existence.

⊕ An increased willingness to resort to litigation is found in many contractors and an expanding government contracts bar.

⊕ Increased public division or controversy over the wisdom of some kinds of expenditures (e.g., some defense spending), often are vented peripherally in controversy over contract or administrative decisions.

⊕ Increased oversight by many congressional sources may discourage contracting officers or their supervisors from risking close calls, taking on politically sensitive cases, or handling "hot potatoes."

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[24] This court was established and given jurisdiction over contract appeals as well as certain other appeals involving the United States by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164. Before passage of this law, the U.S. Court of Claims heard appeals from contract appeals board cases as well as original appeals from contracting officers' decisions.

[25] 41 U.S.C. § 607.

[26] The CDA requires contract appeals boards to provide for accelerated disposition of cases involving claims of $50,000 or less and to establish both expedited disposition and simplified procedures for disputes of $10,000 or less. (Jurisdiction of U.S. district courts over small claim contract disputes was eliminated.) These procedures are intended to encourage the use of the agency boards, rather than the Claims Court, for minor disputes.

[27] The model rules developed pursuant to this mandate appear in the *Procedure Sourcebook*, as do cites to individual boards' procedural rules. In addition, the OFPP has issued a policy directive setting forth procedures for the handling of claims by agency contracting officers and the text of a disputes clause to be included in government contracts. OFPP Policy Letter 80-3; *see Procedure Sourcebook*, 331.

[28] According to the Census Bureau, the dollar value of federal contracting rose by $65 billion (to $206.5 billion) during the five years preceding the current one.

⊛ The establishment (or expansion) of intra-agency audit offices and inspectors general, and statutes or rules enhancing their authority, inhibit settlement of disputes and limit decisional flexibility.

The result has been a reduced willingness or ability to exercise responsibility by contracting officials, and increased doubt in some quarters that they truly act to serve the government's best interest.[29] One knowledgeable observer sees an environment "where management seems willing to throw their difficult problems into the litigation mill rather than work them out at a management level."[30]

Dissatisfaction with many agencies' contracting processes and methods of dispute resolution is increasing.[31] Much of this dissatisfaction is focused on various boards of contract appeals to which agencies and contractors turn after failure to resolve disputes. Many of the broad criticisms are unreflective, and one should bear in mind that judges, boards, caseloads, and work habits vary enormously. Nevertheless, the unhappiness among many contractors, lawyers, and agency officials is based upon accurate perceptions that these disputes often are unnecessarily contentious and their resolution needlessly complex and drawn out and, therefore, very costly to both sides.

2. What Kinds of Cases? Acquisition disputes under agency programs are far more homogeneous than are cases before the federal district courts in that they all involve contracts. While, each agency and its program assortment, board, and caseload have their own characteristics, generalizations as to typical contract disputes may be helpful. For example, the Veterans Administration Board of Contract Appeals handles primarily claims and disputes arising under construction contracts for VA hospitals. The Army Corps of Engineers Board processes domestic and international construction disputes arising under Corps contracts. The Corps BCA also has an agreement with the Washington Metropolitan Area Transit Authority (WMATA) to decide appeals under WMATA construction contracts. The largest board, the Armed Services Board of Contract Appeals (ASBCA), decides a wide range of disputes under DOD procurements. These disputes often include technical issues regarding specifications for state-of-the-art equipment, engineering issues arising under construction contracts, and complex accounting questions associated with claims by the government under the Truth In Negotiations Act, 10 U.S.C. 2304(f). The ASBCA also hears appeals on behalf of other agencies. The General Services Board of Contract Appeals (GSBCA) has jurisdiction not only over disputes arising out of GSA supply schedule contracts, but also appeals under contracts for automatic data processing equipment (ADPE) pursuant to the Brooks Act.[32] Under the Competition in Contracting Act of 1984,[33] the GSBCA has jurisdiction to resolve bid protests brought by disappointed bidders under federal ADP contracts.

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[29] R.J. Bednar & J.T. Jones, *The DOD Contracting Officer*, Report of an ABA Public Contracts Section Subcommittee (1987); *Conduct and Accountability*, Report by the President's Blue Ribbon Commission on Defense Management (Packard Commission) (June 1986).

[30] Nash, *A New Technique for Settling Disputes--The Mini Trial* (1985) (unpublished article).

[31] Where one knowledgeable observer could comment in 1966, "In recent years contractor complaints of delay in receiving ASBCA decisions were rare indeed." *Disputes and Appeals* 60, an understated view two decades later held, ". . . in the past few years the process seems to have been gradually slowing down." Nash, *A New Technique for Settling Disputes--The Mini Trial* (1985) (unpublished article). *See also*, letter from Multinational Legal Services to Robert P. Bedell, OFPP, March 31, 1987 ("Litigated contract disputes have, to put it bluntly, all but swamped the overburdened boards of contract appeals and the U.S. Claims Court.")

[32] 40 U.S.C. 759.

[33] Pub. L. No. 98-369, 98 Stat. 1175.

3. How? -- BCAs and their Procedures. The boards, their rules, and the matters that they decide are hardly uniform, but they have enough in common that the following description is broadly illustrative.

Pursuant to Section 8(h) of the CDA,[34] the Office of Federal Procurement Policy at OMB has promulgated proposed uniform rules of procedure for the boards of contract appeals. These uniform rules have generally been adopted by the boards, although each board has made minor modifications to suit its type of cases and caseload. The procedures followed by the ASBCA are as follows:

> *Appeals.* If a contractor wishes to appeal the final decision of the contracting officer, he must file his written notice of appeal within 90 days of receipt of the decision.[35]
>
> *Appeal File.* Within 30 days of receipt of the appeal, the contracting officer must file with the Board pertinent documents relating to the dispute, including his final decision, the contract and specifications, pertinent correspondence, and other relevent documents. This is commonly referred to as the "Rule 4 File."
>
> *Complaint.* Within 30 days of docketing of the appeal by the Board, the contractor must file his complaint setting forth the basis for and amount of his claim. The government's answer is due within 30 days of receipt of the complaint.
>
> *Written Discovery.* The ASBCA encourages cooperation between the parties in exchanging written and documentary discovery. The Board rules provide that responses to interrogatories, requests for admission, and requests for production of documents are due within 30 days of service.
>
> *Depositions.* The Board's rules provide for depositions, and the deposition practice before the Board has become nearly as extensive as in court litigation.
>
> *Subpoenas.* Pursuant to Section 11 of the CDA,[36] the ASBCA has the power to issue subpoenas compelling testimony in deposition or at trial, as well as subpoenas for the production of documents.
>
> *Hearings.* Hearings are conducted before one Board member and result in a written transcript. Rule 20 of the Board provides that hearings "shall be as informal as may be reasonable and appropriate under the circumstances." The Board's rules refer to the Federal Rules of Evidence, but leave admissibility of evidence to "the sound discretion of the presiding administrative judge."
>
> *Decisions.* After the hearing, the parties customarily submit simultaneous post-hearing briefs. The Board then issues a decision in writing signed by the Board member who conducted the hearing and the other members of his or her panel.
>
> *Small Claims.* The Board's rules provide for an accelerated procedure for claims under $50,000, with the decision rendered within 180 days of the notice of appeal. Pursuant to Section 9 of the CDA,[37] the Board also offers an even more streamlined "expedited" procedure for claims under $10,000, with the decision rendered within 120 days.

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[34] 41 U.S.C. 607(h).

[35] CDA § 7, 41 U.S.C. 606.

[36] 41 U.S.C. 610.

[37] 41 U.S.C. 608.

III

ALTERNATIVES FOR RESOLVING CONTRACT APPEALS

A. Will ADR Work?

While the widespread dissatisfaction over the growth and consequences of contract disputes is obvious, solutions are less so. Several remedies have been prescribed for dealing with the problems encountered. They range from marginal revisions of the boards[38] (e.g., more judges, added support staff) to increased professionalization of COs to structural changes in the ways agencies do business. Some believe that it makes much more sense to have one board, or at most two (one military - ASBCA, and the other civilian), than to have many small ones. However meritorious these proposals may be, a discussion of them falls outside the scope of this study.

Many regard the cluster of methods that have come to be known as "alternative means of dispute resolution" ("ADR") as particularly appropriate to resolving many questions that arise in government contract claims.[39] While some see ADR as merely a "fad," and question its specific utility in government disputes,[40] it is indisputable that these methods successfully help resolve private conflicts raising questions similar to those heard by BCAs. The main conclusion of this report is that it is time for all major contracting agencies, and those who deal with them, to explore seriously the potential uses for ADR and to begin creating an atmosphere in which these methods can be more readily employed. Before addressing specific issues involved in agency integration of ADR methods into the contracting process, we must of necessity decide whether they are worth the effort. The answer is not obvious to everyone. Skeptics have raised concern over agencies' use of some ADR processes. They worry that ADR will reduce the accountability of government officials for their decisions. Some of them fear that widespread use of ADR will merely add another layer of "time-consuming and wasteful techniques in return for minimal (if any) reductions in the alleged delay and cost of resolving a relatively small number of contract disputes."[41] Others express concern that resolving many disputes through means that produce no precedent may undermine predictability that aids the government's competitive bidding system, heighten contract costs, and increase uncertainty and disputes.[42] A few even maintain that many officials do, and should, prefer a system that shifts most potentially controversial or difficult decisions to judges, accountants, technicians, or others who are less directly involved in managing government contracts.

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[38] *Expediting Contract Appeals* 169-180.

[39] *E.g.*, letter from Multinational Legal Services, P.C. to Robert P. Bedell, OFPP, March 31, 1987. ("Among all the disputes to which the Government is a party, contract disputes are perhaps the most appropriate for resolution by ADR. . . . [C]ontract disputes are primarily disputes about money, more or less involving disputed facts . . .with few questions of credibility of witnesses . . . ADR is the future of government contract litigation."); Korthals-Altes, *The Applicability of Alternative Dispute Resolution Techniques to Government Defense Contract Disputes* (1986), *ADR Sourcebook* 147.

[40] *See* the various arguments in Edwards, *Alternative Dispute Resolution: Anathema or Panacea?*, 99 Harv. L. Rev. 668 (1986), *Administrative Conference Sourcebook: Agency Use of Alternative Means of Dispute Resolution* (hereinafter *ADR Sourcebook*) 77; and in Pou, *Federal Agency Use of "ADR": The Experience to Date* (1987), *ADR Sourcebook*, 101.

[41] Letter from Stuart Schiffer, Civil Division, Department of Justice, to Marshall J. Breger, Chairman, Administrative Conference, dated Nov. 13, 1987. One need not be a skeptic to recognize that ADR is "one of those subjects that receives almost universal endorsement in theory but substantially less in practice." Millhauser,*The Unspoken Resistance to Alternative Dispute Resolution*, Negotiation J. 29 (Jan. 1987).

Two crucial questions are presented. First, do these concerns loom so large as to render ADR ineffective or positively harmful and thus unsupportable in contract claims? Second, how can they be mitigated in practice without sacrificing the unique aspects that can make ADR valuable?

Certainly, many knowledgeable observers have remarked on ADR's potential for the government.[43] The Administrative Conference, for instance, has repeatedly studied issues in governmental dispute resolution and has recommended that agencies make greater use of mediation, negotiation, minitrials & similar means to reduce the delay and contentiousness accompanying many agency decisions.[44] The Conference has even gone on record twice calling for legislation to authorize agencies to agree to use voluntary, binding arbitration in limited classes of contract and other disputes.[45] Numerous articles and reports, including several prepared for the Conference, have demonstrated that mediation, negotiated rulemaking, and similar methods have produced sound agency decisions while avoiding much of the formality and cost of standard processes.[46] Among the agency officials who have taken part[47] and others who have been involved,[48] considerable enthusiasm has been shown.

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[42] Letter from Judge John Corcoran, VA BCA, to Marshall J.Breger, dated Nov. 16, 1987.

[43] *E.g.*, statements at *ACUS Colloquium* by Senator Orrin Hatch and Arnold I. Burns, Deputy Attorney General, Department of Justice ("In the long term, nothing less than a retooling of the roles of lawyers can be accepted, particularly government lawyers. This retooling should deemphasize adversarial behavior and give greater weight to the lawyer as problem solver and negotiator who can resolve controversies before they escalate into major disputes or proceed to a full hearing. This is the central challenge of the legal profession."); *Dispute Resolution in Massachusetts*, Final Report of Governor's ADR Working Group (Nov. 1986)(hereinafter *Dispute Resolution in Massachusetts*); and Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, Mo. J. of Dispute Resolution 9 (1984), *ADR Sourcebook* 163.

[44] *See*, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3; *Procedures for Negotiating Proposed Regulations*, 1 CFR §305.82-4 & .85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR §305.84-4; and *Resolving Disputes under Federal Grant Programs*, 1 CFR §305.82-2.

[45] Conference Recommendations 86-3, *id.*, and 87-5, *Assuring the Fairness and Acceptability of Arbitration in Federal Programs*, 1 CFR §305.87-5, also address procedural safeguards and appropriate subjects for agency arbitrators. The ABA is considering resolutions drawn from Recommendation 86-3; these have already been approved by the ABA's Section of Administrative Law.

[46] *E.g.*, Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L. J. 261; Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1986 ACUS 165; Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 1986 ACUS 637; Adams & Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB's Appeals Arbitration Procedure*, report to the Administrative Conference, 1985; Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, report to the Administrative Conference (1987); Bingham, *Resolving Environmental Disputes: A Decade of Experience* (1986); Barrett, *Mediation and Adjudication: The Double Track Approach*, 30 Fed. B. News & J. 436 (1983), *ADR Sourcebook*, 527.

[47] *E.g.*, Edelman & Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7 (1987); Office of the Inspector General, DOD, *Tennessee-Tom Bigbee Claim Settlement* (report of investigation, July 29, 1987), *ADR Sourcebook*, 583.

[48] *E.g.*, Nash, *A New Technique for Settling Disputes: The Mini Trial*(1985)(unpublished paper); remarks of Jack Lemley, Ralph Nash, and Derek Vander Schaaf at *ACUS ADR*

Outside the governmental context, testimonials to ADR's applications have become so commonplace that some worry about overselling it[49] and many government contract cases resemble those others where ADR has been applied successfully.[50] Even recognizing that most of this evidence is "anecdotal," observation and common sense suggest that a closer look at the possibilities of these methods in government contract disputes should be taken.

Moreover, some empirical evidence of ADR's effectiveness in contract cases does exist. As the next segment of this report indicates, experience to date shows that these methods have "worked" when used in contract disputes. While it is true that proof of the benefits of these methods may be somewhat less than scientific at this point, these case studies show ADR to be effective for cutting cost and delay in some instances. Each agency minitrial save one has avoided years of litigation and a full-fledged hearing, while producing outcomes that appear to have satisfied nearly every party who took part. Even the one Navy case where ADR failed to produce a settlement significantly narrowed the issues and reduced the hearing burden. While these data fall short of absolute, scientific certitude, they do suffice to demonstrate the worth of these methods in at least some contract disputes. Moreover, the adoption of limited policies or rules, combined with efforts to enhance awareness, receptivity and training, have hardly amounted to a major shift in the way contract claims are handled.

We believe that the concerns that have been raised can be met by careful attention when integrating ADR into the contract system at the point where conflicts tend to arise and be dealt with, as well as by enlightened administration and oversight. Accountability issues deserve close attention, since ADR clearly should not be seen as susceptible to producing outcomes that are unreviewable, unfair, or not in the public interest. Methods of ensuring defensible ADR decisions are examined in greater detail in section IV.B, below; for now, let us begin consideration by expressing confidence that guidelines can be developed on ADR use that emphasize the need for flexibility without undermining accountability. After all, agency contracting officials already negotiate routinely over the award and adjustment of tens of thousands of contracts, pursuant to guidance on documentation that is generally viewed as adequate. Settlement negotiations in the context of a dispute generally deal with issues that are the same as, or analogous to, those that typically arise in negotiating or amending contracts. The mere existence of a formal dispute should not render suspect a settlement worked out by the parties, particularly as a sizeable percentage of contractor claims at the CO and BCA levels are already disposed of consensually. As with other kinds

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Colloquium: Harter, *Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship*, 29 Vill. L. Rev. 1393 (1983-84).

[49] Rich, *Alternative Dispute Resolution: Opening Doors to Settlement*, Chemical Week 28 (Aug. 14, 1985); Millhauser, *Rush to Mediation: Where Is the Bandwagon Going?*, Legal Times 16 (Aug. 10, 1987, as clarified, Aug. 17, 1987); *The Effectiveness of the Minitrial in Resolving Complex Commercial Disputes: A Survey*, Report of Subcommittee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, American Bar Association Section of Litigation, July 1, 1986.

[50] Speaking generically of litigation, an experienced observer pointed out, "An attorney or his client tend to advance an argument or an offer as an absolute fixed quantity that cannot change. The position is important to a party, representing the merger of all prior principles and emotions in a case. When the adversary advances a contrary position, the first party sometimes feels threatened and besieged and defensively advances the same position with more argument to overcome the opponent by will, strength, and coercion. One becomes afraid to make a concession which he thinks will be viewed as a sign of weakness and generate demands for more concessions. Further aggression ensues. The other party also reacts in the same manner. Emotions take over and each side may lose sight of a realistic objective evaluation of a case. Consequently effective communication stops and each side points its position at the other sometimes with great hostility. The legal combat continues and escalates." Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, Mo. B.J. 251, 254 (June 1984).

of negotiations, adequate guidance can, and should, be provided on the degree of documentation appropriate to justify settlements reached via ADR.

Critics have also worried that ADR will merely add more procedures, tie up busy executives, and bog down BCA judges who should be concentrating on decisions that will reduce often considerable backlogs and set precedents to avert future disputes. However, hardly every case, or even most cases, will be apt for ADR. In most, it will not be a factor. Second, many agency officials at various levels can serve as principal negotiators, and it would be inaccurate to suggest that only the agency head or other busy high-ranking officials would possess the necessary qualifications. Third, while some disputes will need judicial attention -- especially those that present a new or important question in construing a basic statute or regulation -- such cases clearly do not predominate and by most accounts are not numerous.[51] To the extent that precedent-setting cases do occur, ADR will ultimately allow a BCA to focus more attention on them by taking a little judicial time early in efforts to avoid lengthy discovery or hearingsin other, less important cases . In federal courts and agencies, the benefits of active judges using ADR and related case management techniques have been shown.[52] Though some doubts as to the notion of the "managerial judge" have been expressed,[53] the recent, near-continuous rise in the ratio of filings to BCA judges indicates that in the long run BCAs will inevitably have to take added steps to encourage expeditious processes for reaching acceptable decisions.

Parties, including agencies, can be expected to act in their enlightened self-interest to avoid uncertainty that would interfere with planning or to refrain from resorting to ADR where it is likely to be meaningless. Moreover, BCA judges and other agency officials can be expected to oversee use of ADR methods in ways that allow problems to be brought to light and dealt with as they occur. For all of these reasons, many of the concerns expressed seem overdrawn. The ultimate questions on ADR use do not primarily involve accountability, resources, or efficiency.

Even most skeptics would agree that there are procurement cases where ADR can help and should be used. Most agree that some training in ADR skills would help BCA judges and other participants recognize apt cases and settle them. Such modest steps are worthwhile if only for the prospect of marginal improvements. Whether ADR methods can do more, as they have in certain areas, will depend on whether agency officials, those who deal with them, and congressional and other overseers come to perceive consensual decisions that are reached by a person directly responsible as both possible and often preferable to those delegated elsewhere. If so, no reason exists why ADR cannot work as well with government contract disputes as it has in other contexts.

Having said this, let us turn to a closer look at the innovative methods that have been, or might be, employed.

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[51] *E.g.*, letter from David Schwartz, Multinational Legal Services, to Marshall J. Breger, Chairman, Administrative Conference, Nov. 16, 1987.

[52] *E.g.*, Adams & Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB's Appeals Arbitration Procedure* (1985); Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication* (1987); Cappalli, *Model for Case Management: The Grants Appeals Board (HHS)*, 1986 ACUS 663.

[53] *E.g.*, Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984); Resnik, *Managerial Judges* (Rand Institute for Civil Justice 1982).

B. Minitrial[54]

1. *General.*

Of all the ADR methods discussed, the minitrial has been the one most often used in major contract claims and most written about. The "minitrial" is not really a trial at all, but is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. Following the presentations, the officers seek to negotiate a settlement. The minitrial combines aspects of several alternative means of dispute resolution to create an informal settlement procedure that retains many of the features of adversary litigation. Several agencies have adopted minitrial policies; the approaches are slightly different, but there are certain common elements. Perhaps most important, the parties must reach a pre-minitrial agreement in which the ground rules for the minitrial are set forth, and in which specific time limits for each stage are established. Generally the parties agree to curtail discovery. They also impose a limit of one or two days for the minitrial hearing, followed by a more flexible limit for the negotiations.

The parties each designate one (or occasionally two) principals to represent them at the minitrial. These principals are typically high level officials who have full authority to settle the dispute, and who usually have not previously been involved in preparing the case for litigation. The parties at their option may also choose a neutral advisor to help run the minitrial and advise them on technical or legal issues. The neutral should have a legal, and ideally a technical, background in the area of dispute.

At the minitrial, counsel for each party presents his party's case to the principals and perhaps a neutral advisor, in any way he chooses. This may include oral argument, examination of witnesses, documentary evidence, films, photos or other exhibits. The rules of evidence do not apply. The principals may ask questions of both attorneys and witnesses. Depending on the pre-minitrial agreement, each party's presentation can take anywhere from a few hours to a full day or even more than a day.

Once the hearing stage of the minitrial is over, the principals and, with consent, the neutral meet privately to negotiate without the attorneys. Depending on the wishes of the principals, the neutral may mediate the discussions, give legal or technical advice when asked, or even propose settlement terms. The principals generally have auditors or legal and technical advisors available for consultation, but conduct the negotiations themselves. No transcript is made of the proceedings, and if the minitrial does not lead to settlement, litigation will be resumed without reference to the settlement attempts or to evidence presented at the minitrial.

The advantages of the minitrial proceeding for government contract disputes are many, and are discussed in detail below.[55] Some are worth mentioning briefly here. Preparing and completing a minitrial can take as little as a month or two instead of two to four years required for litigation. The saving of personnel time, attorneys' fees, hearings and discovery burdens, and opportunity costs is obvious. Since the majority of contract disputes involve questions of fact (or mixed questions) it makes much more sense for high level management officials to hear summary presentations and negotiate a settlement using good business judgment, rather than for lawyers to litigate the facts for weeks or months in a hearing. For those who feel that justice is more readily served in an adversarial system than in a conciliatory one, the minitrial retains the best of the adversarial presentations without the time-consuming rules of evidence and procedure. Hence, presentations can take just a few hours instead of a few months as might be required to present similar quantities of information at hearing.[56] Finally, the minitrial, like arbitration and mediation, removes the case from the BCA's docket, and permits the judges to focus on those unsettleable cases.

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[54] The length of this section reflects not only the greater attention that observers have focused on use of minitrials in contract cases, but also the fact that some portions (e.g., principals, other participants, neutrals, rosters) will be pertinent to other devices discussed.

[55] *See* Section III.B.4.

Like any ADR procedure, the minitrial does have its drawbacks and uncertainties. If the pre-minitrial agreement and time limits are not strictly enforced, especially for discovery, the process may still take too long. Also, if only one party participates in good faith, or if the government is not willing to give its principal full authority to settle, or if an inspector general or other investigation follows the minitrial, the process may be doomed to failure. Other issues involve the stage of the litigation at which the minitrial should occur, who should be government's principal, what role the BCA should play in overseeing or participating in the minitrial, and what procedures to use in the minitrial itself.

2. *Minitrial Initiatives to Date.*

Four agencies--the National Aeronautics and Space Administration (NASA), the U.S. Army Corps of Engineers, the Department of the Navy, and the Department of Energy--have experimented successfully with it to resolve contract disputes. Of a total of eleven cases submitted to minitrial by these four agencies, nine have settled and one is ongoing.[57] In addition, the Corps of Engineers, the Department of Justice Commercial Branch, and the Navy have formal minitrial policies; the EPA and the Claims Court have promulgated ADR guidance. These are the experiences upon which most of this study is based.

NASA. The first minitrial ever engaged in by the government was conducted by NASA in 1982. The claim, filed by Spacecom and TRW in 1979, was prompted by a complex technical dispute about whether certain requests by NASA were included in the contract or were changes to it. Shortly after discovery began the parties suspended the litigation for three months to conduct settlement discussions. These failed, however, and by 1981, when the parties had engaged in lengthy discovery, trial was still estimated to be at least a year away. At that point Spacecom proposed that they engage in a minitrial to resolve the dispute. The minitrial hearing lasted only one day, and the parties settled for over $100 million on the second day of negotiations.[58] Although NASA is a proponent of minitrials, that agency has not used the minitrial device since 1982, and does not have a formal ADR policy.

Army Corps of Engineers. By 1984 the U.S. Army Corps of Engineers became interested in experimenting with minitrials. It conducted its first minitrial in December, 1984, and settled a $630,000 claim for $380,000. Six months later, in June of 1985, the Corps used another minitrial to settle a $43 million claim involving a 1979 contract to excavate 11 miles of the Tennessee-Tombigbee waterway. This was a differing site condition action alleging that the soil excavated turned out to be different from the Corps' samples; the contractor, a joint venture named Tenn-Tom, submitted a claim for equitable adjustment. Corps officials did not really expect to settle the dispute, but reasoned that they had nothing to lose by trying. As it turned out, the parties settled for $17.2 million after a total of four days of hearings and two days of negotiations[59] spread out over two weeks.

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[56] Nash, *A New Technique for Settling Disputes--The Minitrial* (1985) (unpublished article).

[57] *See ACUS ADR Sourcebook*, 229-252, 573-593, 701-852.

[58] Appendix B contains a detailed description of each minitrial.

[59] *See* Parker & Radoff, *The Mini Hearing: An Alternative to Complex Litigation*, Bus. Lawyer 38 (Nov. 82), for a discussion of this case and issues raised.

Unfortunately, Tenn-Tom's claim was vehemently opposed by district level personnel within the Corps, and the settlement was criticized for being too generous. A disgruntled Corps employee accused the Corps of incompetence, claiming that the case was too complex to settle in just a few days. This prompted a Department of Defense Inspector General's investigation into the minitrial. A year after the minitrial, the IG released his report, which endorsed the minitrial process in the Tenn-Tom case and concluded that the claim was "reasonably settled in the best interest of the Government."[60] It also recommended, however, that the Corps document its procedures better in the future.

Just after the Tenn-Tom minitrial the Corps issued its first formal circular providing guidance on the use of minitrials.[61] The Corps gave Division Engineers[62] the responsibility for selecting cases for minitrial, and required that the Chief Trial Attorney be notified only when a minitrial had been offered to the contractor. The government principal was to be the Division Engineer, the contractor's principal a senior management official with settlement authority, and the neutral an impartial third party with experience in government contracting and litigation. The circular further outlined the procedure to be followed in drafting a minitrial agreement and conducting the hearing and negotiations.

The Corps' South Atlantic Division has employed ADR once in 1987. The North Atlantic Division also conducted a minitrial although a neutral was not employed in this particular case,[63] and once conducting a variation on its Review Board procedure discussed in Section III.E, below. This most recent minitrial, involving a $1,768,000 claim by Granite Construction Company, was actually a combination of a minitrial and non-binding technical arbitration. The government's and contractor's cases were presented by technical experts, rather than by lawyers, to a neutral technical expert chosen by the two parties. This neutral expert then prepared a non-binding written recommendation and three weeks later made an oral presentation to the principals. After reading the neutral's report and negotiating for four hours principals agreed to settle for $725,630, the amount recommended by the neutral.

The Corps has engaged in two other minitrials. In one minitrial the Middle East/Africa Projects Office settled a $105 million claim for $7 million. In the other, the Ohio River Division resolved a complicated $515,123 claim (consisting of nine appeals concerning such issues as differing site conditions, weather related delays, impact costs and improper bookkeeping) for $155,000 after a two and a half day minitrial.

Almost all participants in the Corps of Engineers experiment express pleasure with its successes so far, and the Corps is actively looking for new cases for using minitrials. The Ohio River Division, for example, now has a new policy requiring that all contracting officer decisions within its jurisdiction be considered for ADR, including minitrials.

Department of the Navy. Interested in NASA's and the Corps' minitrial successes and concerned with the enormous backlog of cases at the ASBCA, the Navy held two experimental minitrials during the summer of 1986. The first of these involved two disputes with McDonnell-Douglas Corporation concerning mixed audit and legal issues. Both disputes were settled through a confidential minitrial process. The second minitrial, involving an overhead cost allocation suit, did not settle, but did significantly narrow the issues.

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[60] Tennessee-Tombigbee Claim Settlement Report, July 29, 1986, *reprinted in ADR Sourcebook*, at 583.

[61] *See* Appendix C for a summary of agency policies.

[62] The Army Corps of Engineers is a decentralized organization. The Headquarters are in Washington, which is also where the Chief Counsel is, but the Division Engineers, who are Generals, have almost complete authority to do as they wish within their divisions. Each division is divided into districts, and it is the District Engineer, usually a colonel, who is the contracting officer on most contracts.

[63] W.G. Construction Corp. case, which settled a $765,000 claim for $288,000 in February, 1987.

As a result of the relative success of its first two minitrials, the Navy circulated a one year test policy in December 1986, stating that it is the Navy's policy to utilize ADR, including minitrials and summary binding and non-binding ASBCA procedures, in every appropriate case.[64] The main differences between the Corps' and the Navy's minitrial policy is that the Navy's General Counsel must approve all uses of ADR before they are conducted, and that the Navy strongly prefers that neutrals be current ASBCA judges.[65] This test policy was followed in July 1987 by a directive requiring contracting officers to offer contractors, where appropriate, a summary binding ASBCA procedure in cases involving $25,000 or less, and in disputes greater than $25,000, to review each case for minitrial suitability. Detailed guidelines on minitrials will be forthcoming from the Navy, but "[i]n the interim, prior to the issuance of a Contracting Officer's Final Decision, the Head of the Contracting Activity ... shall ensure that all appropriate steps have been taken to resolve the claim, including the use of ADR techniques."[66] Currently, the Navy is engaged in a $75,000 minitrial in Seattle and is considering three other cases for possible minitrial.

Department of Energy. At about the same time that the Corps and the Navy were implementing ADR, the Department of Energy held its first minitrial in the summer of 1986, involving a case where a six-week hearing had just been completed. Boecon, a subsidiary of Boeing and the subcontractor in this case, had filed a claim against the Department of Energy for damages from government changes and delay in the construction of the substructure of a nuclear waste processing plant. After a year of discovery, pronounced hostility between the attorneys, and numerous unsuccessful attempts by the Energy BCA to convince them the settle, the case finally went to trial.

Following the hearing before the BCA, and after the Administrative Judge began to write his opinion, the parties, with much judicial prodding, agreed to a minitrial to try to resolve the dispute. The parties' settlement of over $5 million, which was very close to the original claim, was formally approved by the Energy BCA three months after the minitrial. The Department of Energy has not conducted any more minitrials, and does not have a formal policy on ADR.

Other Agencies. Other offices have become increasingly interested in ADR. The Commercial Litigation Branch of the Department of Justice circulated a minitrial policy in June, 1986, but has not yet conducted any minitrials. The Environmental Protection Agency has issued guidance on the use of ADR (including minitrials) in enforcement cases. The Claims Court this spring implemented voluntary ADR procedures suggesting or favoring the use of settlement judges and minitrials.[67]

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[64] Department of the Navy Alternative Disputes Resolution Test Program, *outlined in* Memorandum from the Secretary of the Navy, 23 Dec. 1986 (hereinafter *Navy ADR Program*), *reprinted in ADR Sourcebook*, 847.

[65] *See* Section III.B.6. *infra* for a detailed discussion of minitrial neutrals.

[66] Memorandum from Everett Pyatt, Assistant Sec. of the Navy, July 13, 1987.

[67] For texts of these and other relevant agency policy statements, *see ADR Sourcebook*, 703 - 860.

3. *Minitrial Results.*

Of the 11 cases that have been minitried by the government, all but one have settled.[68] Generally, the settlements have been somewhere between the two parties' positions. For example, in the Tenn-Tom case, "[t]he settlement represented a substantial compromise by both sides from their initial positions in the litigation."[69] It is difficult to tell in all cases how close the settlements have been to what a board would decide, but at least in the Boecon case the settlement figure was very close to what the judge would have awarded.[70] Given the high settlement rate and acceptability of results (with the exception of the controversy over the Tenn Tom case), it is surprising that so few minitrials have been undertaken.

4. *Benefits and Burdens.*

The key consideration for most parties in choosing to participate in a minitrial is the desire to save time and money. The amounts saved will depend on what stage in the litigation process the minitrial is used. Minitrials generally take between one and three months for preparation, hearing and negotiations, as compared to a board of contract appeals process that can take two to four years. The neutral in one minitrial, for instance, estimated that the process saved the parties "several months of additional discovery and a minimum of four weeks of trial before a board of contract appeals."[71]

More specifically, a reason for preferring a minitrial to litigation has been that such an expedited procedure ties up key personnel for a much shorter period of time.[72] This is especially true for smaller contractors and agencies who have only a few top managers. When these managers are occupied with litigation for a year or more, a company inevitably spends less energy on servicing current contracts or developing new business. Although the opportunity cost of litigation is often less immediately apparent to government officers, the administrative and legal manpower costs in both the private and the public sectors should be a significant incentive to shortening the time spent on resolving contract disputes. Minitrials often produce better decisions than formal processes because the decisionmakers are the experts and managers in the field. Finally, minitrials are particularly advantageous when the parties expect to have a continuing business relationship, allowing them to resolve disputes quickly and in an informal way that avoids much of the adversarial posturing inherent in litigation.

While a minitrial has usually resolved disputes sooner, evidence that the process dramatically cuts down the total hours spent on the dispute is more commonsensical and anecdotal than scientific. Parties' attorney must master the details of dispute in a short time in order to present cogent, complete arguments at a minitrial. While minitrials are believed to reduce discovery and trial time, "[t]he preparation by the trial attorney must be even more intense and consuming than for a board hearing. The trial attorney must know his case *totally*."[73] One Corps attorney said that in preparation for the minitrial she did about two-thirds the amount of work she would have for a regular hearing. She also said, however, that the process was well worth the time because it resolved the dispute quickly and with less disruption of work.[74]

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[68] The one unsettled case was a Navy minitrial conducted in the summer of 1986. According to John Turnquist, Associate General Counsel (Litigation) for the Navy, however, the minitrial did serve to significantly focus the issues. Interview, June 19, 1987.

[69] Ruttinger, *Army Corps of Engineers Settles $45 Million Claim at Mini-Trial*, Alternatives to the High Cost of Litigation, Center for Public Resources, Vol. 3 No. 8 (August 1985). *See also* Nash, *supra* note 30 (the minitrial arrived at "a settlement which pleased neither party but which represented a fair middle ground").

[70] Interview with Judge Carlos Garza, June 24, 1987. Judge Garza had already held a six week hearing in the case and was almost halfway through writing his opinion when the minitrial was held, and was thus in a good position to judge the fairness of the settlement.

[71] Nash, *A New Technique for Settling Disputes - The Mini Trial* (1985) (unpublished article). *See also* Sample Minitrial Agreement Between the United States Army Corps of Engineers and Appellant, in *ADR Sourcebook*, 710 (minitrial is a procedure which "provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board").

[72] *See, e.g.*, Jack Lemley, remarks at *ACUS Colloquium*.

Further considerations in estimating the time the process will take include the expected length of the hearing and negotiations, and the possible travel to and from the minitrial. The amount of time required of the neutral similarly varies with the complexity of the case and the role the principals expect him to play in the minitrial. Clearly, an intensive preparatory effort is required for effective presentation and negotiation. Equally apparent, however, is that these efforts have almost always succeeded in finally resolving the case.

5. *Minitrial Decisionmakers.*

Principals. Crucial participants in any minitrial or other ADR process are the principals, representatives of each party to the dispute who hear competing presentations and then seek to negotiate a settlement. The principals most often have been fairly high ranking government officials and business executives. Opinion and practice have varied as the appropriate rank, experience, and preparation of the principals, but a number of helpful observations can be made.

HOW MANY PRINCIPALS? While the number of principals representing each side has varied up to three (one business representative and two attorneys, for instance),[75] a clear trend exists toward using a "panel" of only one principal from each side (possibly assisted by a neutral advisor). This has the advantage of being less burdensome, as well as simplifying the "hearing" and negotiation parts of the minitrial; unless a case is so sprawling and complex that a lone representative cannot properly prepare and negotiate, one should suffice. The exception proving the rule is the one government minitrial to date where a larger panel was employed--the NASA-TRW dispute, a very complicated multi-party case in which, coincidentally, no neutral advisor was used since none could be found who was adequately informed.

WHO SHOULD SERVE? In selecting its principal, a party must balance several competing factors. Principals should be located high enough in their organizations to negotiate, and successfully defend, a binding settlement. They must have inherent or delegated authority to bind the organizations they represent in the dispute at hand. Generally, principals should come from a higher level in the organization than that where the controversy arose.[76] According to several participants surveyed, principals should have little prior involvement with the case so as to be able to take an objective look at the issues.[77] On the other hand, they will need enough technical expertise to grasp the main issues quickly.

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[73] Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.

[74] Interview with Reba Page, Ohio River Division trial attorney in the Corps' Walter T. Dickerson minitrial, July 31, 1987.

[75] *The Effectiveness of the Mini-Trial in Resolving Complex Commercial Disputes: A Survey*, Report of Subcommittee on Alternative Means of Dispute Resolution, Committee on Corporate Counsel, American Bar Association Section of Litigation, July 1, 1986, p. 24 (hereinafter "*ABA Subcommittee Report*"), *ADR Sourcebook*, 253.

[76] Edelman and Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7, 9-10 (1987), *ADR Sourcebook*, 231.

Another competing consideration, especially for government agencies, is that the principal obviously cannot routinely hail from such a high level that his or her involvement will detract in a major way from the agency's operations. Recognition that top management's time is at a premium will be especially important if minitrials become more common.[78] Agencies can meet this concern by tailoring the rank of the manager-principal to suit the magnitude of the case, by encouraging ADR use earlier in the case (e.g., the CO level), or by bringing in auditors or others occasionally as principals.

Contractors have often used vice presidents with responsibility for government contract activities or other senior executives. In the Corps of Engineers, the principals have tended to be division engineers, generals who oversee the work of several districts where contracts are administered day-to-day. In smaller minitrials, contracting officers have occasionally acted as principals.

Agencies may wish to designate several respected officials (e.g., generals or admirals in the armed forces) as a pool of potential principals for major minitrials, take related steps to make participation as a principal an attractive career step, and encourage (or even provide) training in negotiation, mediation and ADR skills among groups of potential principals.

Virtually all knowledgeable observers disfavor using attorneys as principals, preferring high or mid level bureaucrats, business representatives or technical experts. As two active government proponents put it,

> The involvement of top management in the mini-trial is essential for the success of the process. Having top management decide the dispute, rather than attorneys and judges, enables the parties to use management skills and policies to resolve a dispute that is heavily fact-oriented.[79]

Lawyers are trained, and often tend to act, more as advocates than as negotiators, and may be less likely to reach decisions based on sound business reasons than on litigation tactics or formal legal or other principles less relevant to the case at hand. Opponents often are reluctant to risk a minitrial under such circumstances. The minitrial policies where litigators are expected to act as principals--those of the Claims Court and the Department of Justice--have been criticized by some experts for this reason, and DOJ's policy in fact has produced a disappointing number of minitrials.

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[77] Where an agency or contractor is not large, or on major agency projects, there may be some difficulty finding an "unbiased" principal. This has not precluded successful resort to minitrial, which in any event will likely be a principal's first chance to hear all the weaknesses of his side's case and should thus be of considerable value. (Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.)

[78] Interviews indicate that several contractors have preferred for the government principal to be as high ranking as possible. Perhaps this stems from a desire to increase finality by reducing second-guessing within the agency; other possible explanations are that a high level officer will be less influenced by operational level biases, less well-informed on technical details, more comfortable dealing with large sums, or simply inclined to split the difference and get back to other duties.

[79] Edelman and Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7, 9 (1987), *ADR Sourcebook*, 231.

PREPARATION. While a few observers prescribe unfamiliarity as the best approach, most principals to date have been well served by being informed thoroughly in advance of relevant facts and the parties' positions. This permits trial counsel to concentrate on educating the *other* principal and the neutral advisor as to the strengths of his case and the weaknesses of his opponent's; counsel should not also feel a need simultaneously to educate his own principal. Principals' minitrial preparation should include both liability and quantum issues, since any settlement will necessarily address these issues and, given the brief time frame, there will not be time to prepare a quantum case once the hearing has begun.

A good example of thorough preparation might be the government principal in the Department of Energy-Boecon proceeding, William Voigt--a nuclear physicist serving as the Director of the Department's Office of Remedial Action and Waste Technology with only limited previous experience in contract disputes. He estimated[80] having spent 60 to 70 hours reviewing briefs and documents, talking to the Department's project manager, and being briefed by the agency's trial attorneys and General Counsel on the law. His burden was especially great because the case had already gone through a year of discovery and a six-week hearing. Most principals to date have spent considerably less preparation time, and some view this degree of preparation by a high-level manager as excessive; Mr. Voigt says he could have negotiated comfortably with less information. Still, in that case and others[81] it has helped produce prompt settlements of bitterly contested, highly complex disputes without subsequent recriminations.

PRINCIPALS' ROLES. During the minitrial process, the principals typically have acted to preside over the "hearing," to enforce (and decide whether to vary) the ground rules, and to negotiate together immediately afterwards. During the initial stage, they are free to pose questions, either while both sides are presenting their cases or in designated question-and-answer sessions; they typically seek to elicit basic facts, have presenters elaborate on an issue, or clarify misunderstandings. Principals also determine the role to be played by the neutral advisor. Several have maintained that it is important that the principals not only approach the process with an open minded willingness to assess both sides, but also conduct themselves so as to avoid giving the appearance of being biased as to the merits; to do otherwise inhibits effective negotiation. One way to do this is to encourage the neutral advisor to ask many of the tough questions at the hearing, even at the risk of making the neutral appear biased.

Once the principals have had a chance to assess the strengths and weaknesses of both sides' positions, their negotiations should take place promptly and should be final and binding. This does not mean that expert advice should not be sought as needed during their talks or that other representatives of the parties ought never be involved in the negotiations, but that the responsible principals should have, and feel comfortable exercising, authority to resolve all issues before them without seeking third-party approval following the close of negotiations. (One exception here may be occasional consultation with in-house counsel in preparation of a settlement or legal memorandum supporting the result.)[82]

Successful service as a principal will in many cases call for more than sound preparation, questioning and negotiating. Some degree of courage and bureaucratic skill will also be needed, given that principals sometimes will have need to find merit in an opponent's contentions long after subordinates, auditors or counsel have taken fixed (and possibly narrow or contentious) positions to the contrary. As with some agencies or administrators who prefer safe, "regular" decisions, there will inevitably be some potential principals who lack the fortitude or skill to deal creatively to resolve difficulties that arise over a contract.

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[80] Interview with William R. Voigt, Jr., DOE, June 26, 1987.

[81] In at least one case, principal was drilled in a preparatory mock-minitrial.

[82] See *Navy ADR Program*, IV C. 1(d)(IV).

Just as many cases will not be appropriate for ADR, inevitably some mistakes will be made in those that are minitried.

Contracting officers, project officers and their superiors (at headquarters, regional or division level) must see the truth in two fundamental notions: *first*, that there are worse things than making a mistake and, *second*, that safe procedures and exhaustive documentation will often produce, not better decisions, but still more procedures and, ultimately, stultification. It remains to be seen whether bureaucratic behavior, agency evaluations and congressional oversight of minitrial uses can reflect sensitivity to these factors. If they do, there is a possibility of the leadership necessary for developing (1) an atmosphere that will make line officers comfortable with exercising discretion, (2) minitrial or other ADR procedures designed to yield defensible compromise efficiently, and (3) officers who have the skills and training to use them energetically.

Much remains to be done. So far, for whatever reason, apparently no principal has served twice in minitrials. In some agencies, congressional objections or other controversy over particular settlements have had inhibiting effects. It may be, for instance, that, notwithstanding the exceptional leadership displayed in the Corps' ADR effort, the relatively small number of minitrials so far may stem from a reluctance of some division officers to risk district-level recriminations or inspector general investigations. It is certain though, that, without bureaucrats and officers who are willing and able to exercise the negotiation and management skills necessary for a principal, the value inherent in minitrials and other kinds of ADR will never be realized in the government.

6. *Other Participants.*

Principals must be well-advised. They have generally had access to advisors, including (in appropriate cases) legal counsel, technical experts, and auditors. Frequently, these persons have taken part themselves as witnesses or observers in minitrials; in other cases, the principal has consulted with them only in preparation and acted alone at the minitrial itself. These persons certainly should be available generally to desirous principals during the hearing and negotiations.[83] This serves to produce a more well-informed, defensible resolution, enhance accountability, and build intra-organizational support for the settlement. These goals are important, since by the time a dispute reaches the BCA stage, major segments of the agency will have fought a contractor's claims and likely will be displeased at the prospect of a settlement that is negotiated in a day or so.

At times during the negotiation phase, the principals have benefited from caucuses with others from their organizations to discuss the progress of the negotiations and staff's concerns. Government principals have also brought auditors or other staff members into the negotiations on occasion when they thought it important for the contractor to provide a more detailed explanation of claimed costs.

On occasion, access to the hearing has been restricted tightly, and witnesses sequestered --as in the Navy-McDonnell Douglas minitrial, where, in addition, auditors were not allowed to be present at minitrial of a case raising cost allocation issues.[84] Unless secrecy is especially important, it will ordinarily be unwise to sequester most minitrial witnesses, particularly experts, since a looser format may encourage dialogs or exchanges that can help focus issues and sometimes promote agreement.

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[83] The Corps apparently makes a practice of including auditors at minitrials.

[84] This decision, and the subsequent settlement, have been criticized by some agency officials as intended simply to "allow the parties to continue their business relationship" without confronting all issues; however, even these critics have not questioned the substantive settlement, only the closed process by which it was reached.

Legal Advisors. Many interviewed for this study suggested that if the principal is to have a legal advisor during the course of the proceedings, this person should ordinarily not be the trial counsel who prepares and presents the case at the minitrial. It was felt that such a dual role poses the danger that the trial counsel might be too adversarial to provide dispassionate advice during the settlement talks. Also, the principal may have difficulty distinguishing the trial counsel's advocacy from his best advice as to appropriate future action. Other countered that qualified lawyers would know best how to serve their clients, be that in an adversarial or an advisory role, or both.

Auditors. Volumes could be written on the benefits and drawbacks of the growing influence of auditors and inspectors.[85] These personnel will presumably have a role in many cases featuring major issues of accounting principles or their application. They are valuable resources and should not be ignored. Auditors can address cost issues (incurred and allowable) and help principals decide these issues and understand what a good settlement figure is. Auditors who participate in minitrials as part of a management problem solving team--and with recognition that accounting, like management, is often as much art as science--can be quite effective in furthering defensible settlements in the government interest. As with lawyers, principals, and oversight personnel, what is to be avoided is auditor participation that is inflexible, refuses to balance competing views, or fails to give heed to the fact that management realities sometimes must influence decisions as much as "neat" categories.

7. *Neutral Advisors.*

Is a Neutral Necessary? The "neutral advisor" who helps the parties assess the merits of a case is, unlike the principals, not always indispensible. While a majority of attorneys surveyed in one study thought the advisor helpful in resolving their disputes,[86] several government minitrials have yielded settlements without any third-party intervention.[87] In fact, the Department of the Navy's policy is that in smaller cases the use of an advisor will be an exception.[88] Cases where a neutral is less likely to be helpful, while hard to categorize, will likely be those where the principals already have a good working relationship, where issues are simple or amounts small, or, conversely, where complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral. Neutrals probably will also be needed less where the minitrial occurs early on--say, at the contracting officer level--when positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency implicated. In those cases, the contracting officer might well serve as a sort of presider-principal.

Roles of the Neutral. In the cases where a neutral has been used, his role has varied greatly, depending on the dispute and the parties' wishes; the neutral's background, skills and predilections; and developments during the minitrial process. Indeed, one of the strengths of the minitrial has been the flexibility available to the parties for shaping the neutral's role to the case at hand. In most cases, this role has been very different from -- though not incompatible with -- that of a judge.[89] The neutral makes no binding decisions on the merits, and usually does not become involved in the management of the case or attempt to control or regulate the manner or substance of presentations. Rather he serves as a facilitator and an advisor, posing questions and, when asked by the principal representatives, providing insight and observations on various points and issues.[90]

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[85] In the Department of Defense, COs who depart substantially from auditors' recommendations must justify their actions in writing. The Department of Defense Office of the Inspector General now supervises over 20,000 persons, including DCAA auditors and more criminal investigators than the entire FBI.

[86] *ABA Subcommittee Report*, at 20.

[87] Most notably, NASA's and two Corps of Engineers proceedings.

[88] Department of the Navy, Alternative Disputes Resolution Programs Memorandum from the Secretary and Procedures (Dec. 1986), § IV.C.1.(b). (Hereinafter "*Navy ADR Program*").

The neutral's role should be defined (at least tentatively) prior to the hearing with input from the principals, who should know what to expect from the neutral. Any shift during the proceeding should be only with the concurrence of the principals.

In the Corps' Tennessee-Tombigbee case, as in some others, the role of the neutral advisor turned out to be larger than anticipated. The principals (both high-ranking managers) and the advisor met for dinner the night before the minitrial and decided that, notwithstanding a fairly restrictive minitrial agreement,[91] they should approach the entire proceeding with a degree of flexibility.[92] During the "hearing," the advisor and the principals asked questions to assure that the facts were ascertained. At one point, the neutral advisor suggested that key expert witnesses of each side be called and questioned simultaneously, and then guided them "through a conversation where they were able to directly confront each other in discussing the most significant areas of factual disagreement."[93]

The neutral also helped the parties prepare for, and identify relevant issues in, a supplemental hearing on quantum. During the negotiation the neutral advisor worked actively to aid settlement, advising each side on the strengths and weaknesses of its case, relevant legal principals, and how the law applied to the facts established, as well as serving "as a type of mediator suggesting middle grounds that might lead to settlement and proposing various methods of computing the amount of the price adjustment to which the contractor might be entitled."[94]

This model, obviously a relatively activist one, includes inquisitorial, advice-giving, and mediating components. Attorneys in many minitrials have expressed the view that the advisor is most useful when thus actively involved.[95] While the parties' preferences should be the ultimate arbiter of the neutral's role, it may be said that, without controlling the proceedings or making judicial-style rulings, the advisor can be helpful by acting to help question witnesses in a probing yet nonadversarial fashion, to respond freely to principals' requests for advice,[96] and to point out gently the proper weight to be given certain testimony.[97] In at least one case, the advisor has provided a written, non-binding opinion to aid the principals, while in others he has done little more in furthering settlement than respond to technical or legal questions from the principals. If the principals are concerned about persuading members of their staffs, the neutral can help by suggesting that certain ones be brought into the negotiations or briefed, or work with the principals and attorneys to prepare a settlement memorandum or other justification for the compromise reached. Unless principals specifically direct otherwise, a neutral who feels comfortable acting in a mediative role should not hesitate to do so provided he or she will not be involved in subsequent proceedings in the case.

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[89] "Appeals Board Judges' Conference Explores ADR Applicability," 1 Alt. Dis. Res. Reporter 32, 33 (BNA, May 14, 1987) (remarks of Ralph Nash).

[90] Letter from Stephen Lingenfelter, Division Counsel, to Lester Edelman, Chief Counsel, Army Corps of Engineers, dated Dec. 13, 1984.

[91] The minitrial agreement provided that the advisor "will be responsible for enforcing the time limitations set forth in paragraph 13 hereof, but otherwise will not be actively involved in the conduct of the mini-trial proceedings."

[92] Nash, *A New Technique for Settling Disputes--The Mini Trial*, (1985) (unpublished article).

[93] *Id.*

[94] *Id.* In one case the neutral, when requested, told the principals that the contractor had a slightly better case than the government, but that its costs were inflated and there was substantial room for negotiation. Lingenfelter letter, Dec. 13, 1984. In the Boecon--Department of Energy minitrial, the neutral similarly advised the parties, though never advising a party to accept a particular offer. 1 Alt. Dis. Res. Reporter 45 (BNA, May 14, 1987).

[95] *ABA Subcommittee Report*, at 21-23.

[96] One neutral saw a need for the adviser to "reassure [the principals] as to the impact of federal contract law in the case." 1 Alt. Dis. Res. Reporter 33 (BNA, May 14, 1987).

Requisite Skills. Many participants in minitrials so far maintain that neutral advisors need no legal training, and that any person acceptable to the parties can be used.[98] They point out that many cases turn on engineering, accounting, or other technical or scientific questions. Some suggest that mediation training, is useful, allowing the neutral to respond perceptively to the principals' wishes and help further negotiations if asked. So far, though, no neutral in a government minitrial has been a professional mediator.[99] Others maintain legal expertise to be a *sine qua non*.[100] They note that the principals and their staffs will likely have the background to weigh technical issues, but would frequently benefit from independent legal advice, on often-arcane matters, that will let them better assess risks, reach a decision, and "sell" or defend a settlement within their organizations.[101] Both the Corps and the Navy require government contracting and litigation experience.

Sources. Theoretically, major sources of ADR neutrals include (1) ex-judges, (2) BCA members and other active judges, (3) academics, (4) current government employees, (5) retired government employees, (6) private practitioners, and (7) mediators or other ADR experts. In practice, as mentioned, virtually all neutrals in the relatively few cases to date have been ex-judges or law professors expert in government contracting. Dipping into any of these potential pools has ramifications, many obvious and others fairly subtle.

PRIVATE PRACTITIONERS AND RETIRED JUDGES. George Ruttinger, in his 1986 study for the Conference, thoughtfully explored several major issues involved in using some of these groups,[102] including neutrality standards, relevant expertise, and finding and hiring private neutrals.

There are a number of potential problems in finding, hiring, and contracting with private neutrals. The lengthy nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated rulemaking, where speed and efficiency often are critical. The competition required in all but small procurements may be inconsistent with an agency's particular needs when hiring the services of a neutral when distinct criteria are needed. Emphasizing price as a consideration in evaluating proposals may not be the most effective means of selecting the best neutral for the job. While most agency payments to neutrals (save perhaps in some large arbitrations) will fall below the thresholds for full competition and even CBD notice, this fact does not render negligible the importance of competition and an open process. Also, the picture is complicated by the suggestion made by a few persons that neutrals' services will be considered "personnel services" which must be secured through employment and not contract.

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[97] This might happen if evidence is clearly hearsay or another reason for concern exists. In one minitrial, for example, the neutral pointed out that, while the views of a consulting C.P.A. who testified on planned and total costs would be of interest, he would also want to hear from an engineer who could address the reasonableness of the planned cost and reasons for increases. The neutral pointed out that an auditor generally provides an analysis of information given to him without questioning why or how costs were incurred.

[98] *ABA Subcommittee Report*, at 21.

[99] 1 Alt. Dis. Res. Reporter 33 (BNA, May 14, 1987).

[100] Edelman and Carr, *The Mini Trial: An Alternative Dispute Resolution Procedure*, 42 Arb. J. 7 (1987).

[101] Nash, BOCAJA seminar remarks, April 11, 1987.

[102] *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*, 1986 ACUS 863 (1987), *ADR Sourcebook*, 885. His conclusions, are embodied in Administrative Conference Recommendation 86-8, 1 CFR § 305.86-8.

Other problems of dealing with private neutrals, and some publicly employed ones, relate to qualifications and neutrality. Hard-and-fast rules are not easy to come by, but the Administrative Conference has suggested a few guidelines in Recommendation 86-8:

"While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"--*e.g.*, no prior affiliation with either the agency or the private industry involved--may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it."[103]

A few agencies have taken positions against using as a neutral, any private lawyer who represents contractors against the government or who has any past or present affiliation with any party. These policies seem somewhat too restrictive, though they may have been justified as necessary to insulate the first few tentative minitrials from one possible source of criticism. The persons most knowledgeable about contracting disputes will almost certainly have been affiliated with the government, private contractors, or both. In the long run, unless retired and sitting judges are used exclusively, restrictive agency policies will probably mellow. So long as private neutrals have no personal or financial stake, they should be eligible to serve.

ACADEMICS. A surprisingly high number of advisors have been law professors expert in government contracts. Some programs regard them as preferred minitrial neutrals,[104] because of their expertise and perceived neutrality. In addition, unlike BCA judges they can be employed without concern that other cases will suffer neglect. On the other hand, such neutrals, unless *pro bono*, will have to be contracted with and paid. Occasional observers have also complained that academics may have strong views on some legal, accounting or technical questions and thus unduly influence the outcome.[105] In any case, professors with this background are minuscule in number;[106] barring a rapid rise in academic interest in the area, this pool will remain shallow quantitatively if not qualitatively.

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[103] Conference Recommendation 86-8, 1 CFR 305.86-8.

[104] Corps ADR Policy, *ADR Sourcebook*, p. 705-706.

[105] One informed observer expressed concern over this problem in a Navy minitrial of a case where complex accounting standards were applied to an involved fact situation.

[106] All such government minitrial neutrals to date have taught at George Washington University School of Law, which has a unique government contracts program.

BCA MEMBERS AND OTHER ACTIVE JUDGES. Many, probably most, observers in the contract field view these officers as potentially excellent neutrals. Active BCA members and judges comprise the preferred sources for minitrials under the recent Navy and Claims Court ADR policies. Obvious advantages include their expertise in government contracting matters,[107] the authoritative nature of their advice, the fact that they are already on the government payroll, and their relative neutrality.[108] The BCAs, currently the tribunals of last resort for the great bulk of government contract disputes that reach litigation, have generally gained credibility and authority that may quite readily be employed in helping parties resolve many disputes earlier in the process and with less formality than a full hearing.

Other advantages will sometimes accrue. Administrative judges are familiar with issues or cases (or classes of cases) commonly before their boards, and presumably should take less time than outsiders to get up-to-speed for a minitrial. Also, a presiding BCA judge may more readily enter as a board order a settlement negotiated with the involvement of another judge than one facilitated by a private neutral; some contend that this may influence the government's willingness to settle, since in some cases a formal order, unlike an agreement between the parties, may be paid from the general judgment fund rather than scarce agency program funds.[109] Similarly, Congress may prove more receptive to appropriating additional funds to cover large settlements approved by a BCA member, and congressional committees or inspector generals somewhat less likely to scrutinize closely such agreements.[110]

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[107] BCA judges are required to have five years experience in public contract law.

[108] Administrative Judges at BCAs, according to the CDA, are to be selected in same manner as ALJs, 41 U.S.C. § 607(b)(1), and are insulated by *ex parte* restrictions and other guarantees of independence. Daniel Joseph's Draft Report to the Administrative Conference of the U.S. regarding agency use of settlement judges, (October 1987), indicates that the settlement judge can command substantial deference and speaks with authority that derives both from his general familiarity with an agency's case load and his position as a judge; "If that official decisionmaking system meets (the parties) halfway with an official, authoritative, but still non-binding and non-prejudging review of the questions of whether settlement is appropriate, they may feel that their perceived need to invoke adjudication has been responded to".

[109] Technically, the CDA requires agencies to reimburse the judgment fund, 41 U.S.C. § 612(a), either out of current funds or through deficiency appropriations from Congress. Sometimes, however, agencies cannot reimburse the fund because they do not have enough money themselves and are unable to get additional appropriations, either because OMB prevents them from asking Congress or Congress refuses the request. While GAO seeks to ensure subsequent reimbursement, and maintains that it usually does so, contracting officials' perceptions that payments will not affect current appropriations are real and have an effect.

[110] An example of the danger settlements can run into is *Blackhawk Heating and Plumbing Co. v. United States*, 622 F.2d 539 (1980). The Veterans Administration ("VA") reached a $10.3 million settlement with Blackhawk for a dispute arising out of the construction of additions to a VA hospital. Before the money could be paid, however, a number of senators and congressmen questioned the settlement and urged the Administrator of the VA not to pay it. The Administrator nevertheless decided to go ahead and honor the settlement. As a result, an amendment was added to the Supplemental Appropriations Act of 1974 which required the VA to obtain specific appropriation from Congress to settle any construction contract dispute for over $1,000,000. The conferees also provided that the VA could pay only up to $6,000,000 of any pending settlement agreement. The conference report further stated that it is the sense of the conferees that all claims against the Veterans Administration should be processed through the agency Board of Contract Appeals unless there is adequate legal analysis, audit information, and claim documentation to show that settlement outside the board of contract appeals is in the best interests of the government.

The VA paid $6 million of the settlement before the Appropriations Act was enacted into law, but thereafter could not legally pay the remaining amount. The court held that the contract was subject to acts of Congress, and that Blackhawk was not entitled to the rest of the settlement, though it could still pursue further relief in an appropriate forum in connection with the contract claims underlying the settlement.

Consultations with representatives of the General Accounting Office ("GAO") and with other experts in federal personnel and contracting, reveal no legal obstacles to BCA members acting as neutrals in cases pending before their own or other Boards. The CDA says only that BCA members shall have no other inconsistent duties.[111] It seems that as long as the agency knows that its BCA members are serving as neutrals and has determined that there is no conflict with their regular duties, there are no legal impediments to using BCA judges as neutrals.

On the other hand, the Army Corps of Engineers has so far preferred not to use BCA judges, and has employed private neutrals. Several knowledgeable observers have put forth vigorous arguments that using BCA judges as neutrals may not be the best choice. They pointed out:

⊕ Government personnel's time and services are hardly "free," and the effective costs may equal or exceed those of private neutrals.

⊕ BCA judges, at least at several boards, have large backlogs and can better spend their time writing decisions than working to resolve cases that may ultimately settle without judicial intervention.[112]

⊕ Many BCA judges are experts, not at mediation or minitrial or even settlement promotion, but rather at holding formal hearings and applying contracting or accounting rules to factual situations in written decisions.

⊕ Even if the BCA member acting as a neutral advisor is recused after an inconclusive minitrial, the close quarters and small size of most boards can render confidentiality difficult to maintain. A judge may be hard-pressed to avoid hearing discussions of a case.

⊕ Many boards have only three members, and--since panels are comprised of three judges--will have trouble finding a minitrial or settlement judge who could then be recused if settlement efforts fail.

These interviewees maintained that active judges, who are used to presiding over formal proceedings and issuing rulings to control the parties, are less likely to tailor their actions to the case at hand than others with relations to the parties that are more flexible and less hierarchical. They feared losing control to the judges of a process intended to be shaped and guided by the parties.

It is a fact of life that some judges are more successful promoting settlements than others who are less activist; minitrial "styles" will vary similarly. Even so, it is worth considering whether BCA judges as a class, presiding regularly as they do over a relatively compact group of agency personnel and public contracts lawyers, will be less inclined to intervene actively to offer frank opinions and explore alternatives, and will be received less comfortably, than someone who is unlikely ever to preside again over the parties. One judge stated that, if called on to serve as a neutral in a case already before him, he would feel these constraints:

⊕ He would be uncomfortable getting involved in quantum discussions.

⊕ He would be less likely to get involved in furthering a rapport with the principals, as have some neutrals.

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[111] 41 U.S.C. § 604(a).

[112] The majority of cases at the ASBCA, for example, have been resolved without hearings in recent years. Comments of Judge Ruth Burg at meeting of Administrative Conference Committee on Administration, May 2, 1986, minutes.

⊕ He would be leery of *ex parte* contacts and of talking to the principals without counsel present, as many mediators and other neutrals do regularly.[113]

The same judge suggested that he would feel only somewhat less constrained if he were not going to be on the panel ultimately hearing the case, and would feel most free to take an active role if he were doing it for another agency's board. While these averments hardly prove that judges should not be used, they suggest that it may be unwise to limit the parties to judges from a particular board or even to BCA judges as a group.

The weight of the objections recited, when compared to the advantages of using board members, is certain to vary depending on the judge, the board, the case in question, and available alternatives neutrals. Several can be overcome, and it is clear that agencies have the authority to use BCA judges as neutral advisors. This is true both for cases before the boards and at the CO level.

For now, it is enough to state that these expert officials should by no means be routinely excluded, if for no other reason than that dispute resolution experience gained in mediation or minitrials may be carried over to the remainder of a judge's cases.[114] The enthusiastic responses by several board chairmen to experimenting with ADR, and specifically to having interested board members trained to act as minitrial neutrals, indicate that careful thought should be given to how best to employ them more actively to resolve cases without hearing.

Selection and Payment. The parties sometimes identify the expert in the minitrial agreement; more commonly, the minitrial agreement includes a provision setting forth the selection procedure. The most common process so far has probably been for the parties to submit ranked lists of acceptable neutrals.[115] In one case, this was a prolonged process, with over a dozen suggestions being rejected before an acceptable person was found.[116] The new Navy process calls for the parties to seek to agree on a list of mutually acceptable ASBCA judges to be submitted to the Board's Chairman. At the Claims Court, an ADR judge is assigned by the Clerk of the Court on application by the parties with the presiding judge's concurrence.

Occasionally an effort is made to ascertain, and maintain, an advisor's neutrality at this stage. This may be done by forbidding either party to approach unilaterally the advisor concerning the merits, or by even requiring the parties' to ascertain and disclose all prior contacts with a person nominated to serve as advisor.[117] Such formality often will be unnecessary, or even counterproductive, but may at times help guarantee acceptability and fairness.

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[113] Interview with NASA BCA Judge Carroll C. Dicus, Jr., July 15, 1987.

[114] This have proven true, for instance, at the MSPB, where some presiding officers participating in an expedited appeal experiment upped their overall settlement rate dramatically. Letter from Paul Mahoney, MSPB, to Charles Pou, dated March 11, 1987.

[115] *E.g.*, *ADR Sourcebook*, 753-4; a particularly comprehensive provision for selecting a neutral in a private minitrial provided,

> The parties will select a neutral advisor acceptable to both parties. The parties will exchange lists of five choices for the neutral advisor, listed in order of preference. Neither party shall nominate any person as a neutral advisor who has any conflict of interest, bias or partiality for or against either party. If one name appears on both lists, that person is automatically selected. If two or more names match, the name with the highest average position on the two lists is selected. If no name is common to both lists, the parties will attempt to agree to select a person nominated by one party who is acceptable to the other.

[116] Some minitrial agreements in private contract disputes provide that if no neutral is agreed on by a specified deadline, an ADR organization will make the selection from a list. *ABA Subcommittee Report*, at 13.

A few private neutrals have served *pro bono*, while others have contracted to serve for fixed fees,[118] with the costs split by the parties. An alternative used occasionally provides that if the advisor gives an opinion on how the case should be resolved, a party that does not follow the recommended disposition shall bear the advisor's fees and expenses.[119]

Roster of Neutrals. There are a number of challenges facing the expansion of ADR and the use of neutrals. Agencies should attempt to develop and refine procurement procedures that will simplify the process of hiring outside neutrals. The government should also strive to expand the base from which to select the services of either private or public neutrals. Information on neutrals should be pooled into a centralized place from which to formulate rosters. Agencies should be flexible in defining the qualifications required of outside neutrals, by avoiding rigid technical and expertise requirements. Agencies, Congress, and others employing ADR should further the following goals:

*increasing the supply of ADR services available to the federal government,

*insuring qualifications of neutrals,

*improving acquisition methods for hiring neutrals, and

*clarifying neutrals' roles and authority.

A large number of interviewees saw great potential benefit in developing a central roster of ADR experts and, in particular, minitrial neutrals for contract cases.[120] In their view, rosters can save time and energy for parties seeking an advisor, help small boards find settlement or minitrial judges, and serve to encourage creation of a cadre of reliable, expert neutrals to help resolve contract disputes consensually. One or two agencies have made use of short lists of private neutrals, but so far these efforts have been very informal.

It seems clear that a government-wide roster is worth a try. Having said that, a number of questions arise: Who should be eligible for listing? Should standards of experience, education, or third-party recommendations be set and non-conforming applicants rejected? If so, what criteria should apply? Should the roster be limited to a small, elite group,[121] on the theory that this will enhance the credibility of the nascent minitrial process and tend to cause those on the list to view their role as a public service? Alternately, should the roster be based on a disclosure principle, with most or all applicants who provide certain data being listed, leaving the parties to decide on a particular neutral and possibly stimulating a "cottage industry" of advisors? Should any particular groups, such as government personnel or private attorneys, be wholly excluded on grounds that one side or the other likely will strike them for possible bias or conflict of interest? How should complaints against allegedly incompetent or unfair advisors be handled? Should there be separate rosters for different kinds of cases or skills?

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[117] *See*, Minitrial Agreement between Trunkline LNG Co. and FMC Corp., Oct. 4, 1985.

[118] Contracting issues in government agency acquisition of neutrals' services are discussed in Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution* and *Negotiated Rulemaking*, 1986 ACUS 863 (1987), *ADR Sourcebook*, 891.

[119] *E.g.*, EPA model agreement to institute minitrial proceedings, p. 2.

[120] In its Recommendation 87-8, 1 CFR § 305.87-8, the Administrative Conference called for such rosters, which it would work with the Federal Mediation and Conciliation Service ("FMCS") and affected agencies to compile.

[121] Much like the D.C. Circuit Court of Appeals' new mediation program or the Center for Public Resources' list of "distinguished persons" available to help resolve certain disputes, which is comprised of persons such as former judges, government officials, and executives.

These questions need not all be addressed exhaustively in this report, but several points are worth making. *First*, the list probably should include all who have experience as minitrial advisors. *Second*, it should include all administrative judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both.[122] (Some safeguards to ensure interagency reciprocity may be necessary.) *Third*, the list should include all retired Claims Court, BCA, and federal judges who are interested. *Fourth*, in any case before a contracting officer or a BCA, the parties should have the option of selecting *any* mutually agreeable neutral who is available and has no clear conflict of interest, regardless of where the neutral comes from. *Fifth*, no standard fee scale should be established, and, indeed, neutrals should be encouraged to serve in some cases *pro bono* or at reduced rates; agencies expecting to have their judges loaned out should consider developing standards for reimbursement by user agencies.[123]

Several groups might be in a position to compile such a roster and keep it up-to-date, including the Administrative Conference, the Office of Federal Procurement Policy ("OFPP"), or the Board of Contract Appeals Judges Association ("BOCAJA"). It is our view that, resources permitting, the best-placed of these groups to administer such a roster is, quite simply, the Administrative Conference, working with the consultation of the groups mentioned and others knowledgeable about contract claims. The Conference's membership has recently approved a recommendation calling on its Chairman to work with other agencies to establish rosters of neutrals on which agencies can draw.[124] Similarly, the recommendation suggests that the Chairman work to encourage imaginative efforts to encourage the sharing of federal neutrals and remove obstacles.[125] The Conference's stated willingness to serve, combined with its relative objectively and familiarity with the administrative process, make it a natural candidate for this job.

C. Mediation

1. Where has it been used?

A second category of ADR that may be useful in government contract cases is mediation. Several courts and agencies have instituted mediation programs, some with dramatic results. Mediation is a process in which the parties may reach settlement by negotiating directly with each other with the help of a neutral mediator who often is specially trained in dispute resolution. In addition to many district courts, several federal courts of appeal have introduced mandatory mediation for some cases. The Second, Sixth and Eighth Circuit Courts of Appeal have operated programs for some time.[126] The Court of Appeals for the District of Columbia Circuit commenced, effective May 8, 1987, an experimental civil mediation program that requires attendance at an initial mediation session.

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[122] An informal arrangement now in place between the NASA, Energy, and HUD Boards provides for exchanges of administrative judges where recusal of a settlement judge or retirement reduces the available panel to fewer than three. No legal obstacles appear to inhibit inter-agency sharing; indeed, agencies have for years shared administrative law judges from time to time, with or without reimbursing the lender agency.

[123] *Id.*

[124] Administrative Conference Recommendation 86-8, para. A.5, 1 CFR § 305.86-8.

[125] *Id.* at para. A.2.

[126] John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, Missouri Bar Journal 253 (June 1984); Robert W. Rack, Jr., *Pre-Agreement Conferences in the Sixth Circuit Court of Appeals*, 15 Toledo L. Rev. 921 (1984). A variety of Federal Judicial Center reports have also dealt with the issue of settlement conferences including: D. Marie Provine, *Settlement Strategies for Federal District Judges* (1986); *The Role of the Judge in the Settlement Process* (1977); and Frederick B. Lacey, *The Judge's Role in the Settlement of Civil Suits* (1977).

Distinguished senior members of the bar serve as mediators, and parties must be represented by someone with authority to enter into a settlement agreement during the session. *Pro se* cases are excluded, as are those involving multiple parties or intervenors. Counsel are required to provide some case documents to the mediator, and to prepare short position papers.[127]

2. *What is it?*

Mediation is typically initiated either by the parties voluntarily submitting the matter to a public or private dispute resolution organization, or by the court suggesting or ordering the parties to submit to mediation. The mediator is generally process-oriented, arranging meetings between the parties, assisting in the exchange of information, and relaying parties' interests and positions. In fulfilling this role, the mediator may have private meetings with the parties to facilitate the negotiations, and may even actively participate by proposing settlements. In many cases the mediator need not have any special expertise in the area of dispute, but in contract cases it is often helpful if he does.

3. *Advantages and Disadvantages in the Government Contract Setting.*

Mediation has the advantage of often being a fairly quick and inexpensive procedure. Since the negotiations are private they can be made confidential, or at least treated as settlement talks, an attractive feature in many cases. Furthermore, the negotiations can be informal and relatively non-adversarial, helping preserve future business relations and cooperation. Finally, mediation, like arbitration, clears the courts' overloaded dockets.

There are, however, some disadvantages. Parties may feel uncomfortable using mediation in lieu of the formal process created by the CDA. Some fear opening up their case in talks with an adversary who "lays behind the log" in bad faith. Another drawback of mediation is that it can be used to simply draw out the litigation with an added step, though this is not likely to be a major concern in government contract disputes that already take two to four years.

Informality, one of the biggest advantages of mediation, may perversely prove a hindrance in some government contract cases. Agreements between parties reached without the formality of a hearing or a written opinion, may not stand up as well to rigorous review, or may be criticized for having less of a documentary pedigree or for not conforming foursquare with certain precedent. Government negotiators are justifiably reluctant to settle a case knowing that the informal procedure, and their performance, may not survive a legalistic review by the agency or a court. Contractors also would not want to participate in a procedure that may end up simply wasting time and money if the settlement turns out not to be acceptable to other parts of the government. Though many of these problems can be corrected, many parties to contract litigation may simply be more comfortable with a more formalistic proceeding than with mediation.

Even given the foregoing, mediation definitely deserves greater use in contract disputes. Probably the best place to begin is with the boards, where a scarcity of supergrade judge slots may make staff mediators attractive and where many current judges can benefit from mediation training. At the least, boards should encourage training and take a page from the D.C. Circuit's mediation book by creating distinguished panels of available mediators. Larger boards, or a combine, should examine seriously the approaches taken by the courts. All boards should adopt policies and rules, described below, encouraging and making possible mediation use.

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[127] *See*, D.C. Circuit and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement, *Third Branch* 19 (1987).

D. Settlement Judges

1. *Current Usage.*

"Settlement judges" can be used to encourage parties to settle their cases without compromising the parties' ability to engage in subsequent litigation should they not be able to reach settlement. While some BCA judges have begun taking a more active posture in encouraging settlement, apparently only the Federal Energy Regulatory Commission (FERC) and Occupational Safety and Health Review Commission have adopted rules for using settlement judges.[128] The U.S. Claims Court has recently implemented a policy to inform parties at the outset that they may request a settlement judge to help them assess their positions, resolve their dispute or narrow the issues in controversy. The settlement judge is another member of the Claims Court who works in confidence to guide the parties toward settlement. If the procedure does not produce agreement, the case is typically returned to the presiding judge's docket and litigation can proceed without prejudice toward either party.[129]

2. *Judge's Role.*

The settlement judge's role is subject, of course, to immense variation,[130] but one illustration may be enlightening. A U.S. Magistrate, resolved a 1985 Corps of Engineers lawsuit, filed in U.S. District Court, against Allis-Chambers for loss sustained as a result of recently discovered latent defects in generator coils installed in 1970.[131] The parties were asked to submit five-page summaries a week before the settlement conference, and were expected to have someone in attendance with either authority to settle or enough influence that his recommendation would carry substantial weight. At the conference, the Magistrate had the parties discuss the issues and estimate the litigation expense they would incur in attorney fees, out-of-pocket costs and employee time. He then stated his belief that, while the trial judge would be conservative in any damages awarded, defendants did have an exposure to liability. The parties were then led through a process of exploring settlement rationales and constructing the "building blocks of settlement."

The magistrate then met separately with each party, discussing frankly the problems each side had with its case, and each party's bottom-line settlement figures. He did not reveal to the parties what their opponent was willing to settle for, and promised not to develop his recommended settlement amount by splitting the difference between each side's bottom-line amount. At a final joint session, he announced his recommended settlement, and gave the parties less than a day to advise whether the amount was acceptable. There were to be no counter offers. Unless both sides accepted, they would not know whether the other agreed to the amount. The next day, both parties advised the settlement judge that, subject to Department of Justice approval, his recommended settlement figure was acceptable.

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[128] These agencies' uses of this process are explored in Daniel Joseph's draft report to the Administrative Conference of the U.S. regarding agencies' uses of settlement judges, (October 1987). In fact, during the early 1970's the NASA Board's rules provided for appointment of an administrative judge to help the parties explore settlement. This procedure was discontinued several years ago. Interview with NASA BCA Judge Carroll Dicus, Jr., July 15, 1987.

[129] U.S. Claims Court General Order No. 13 and Notice to Counsel on ADR Techniques (April 15, 1987; *see* Appendix C), *ADR Sourcebook* 731; D.C. Cir. and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement, 19 *Third Branch* (1987).

[130] This area has been explored in detail in several studies sponsored by the Federal Judicial Center. They include D. Marie Provine, *Settlement Strategies for Federal District Judges* (1986); *The Role of the Judge in the Settlement Process* (1977); and Frederick B. Lacey, *The Judge's Role in the Settlement of Civil Suits* (1977).

[131] *U.S. v. Allis-Chalmers*, Case No. 85-C-567-B (N. D. Okla.). This description is drawn from a memorandum by Rowe C. Wynn, Jr., Assistant Chief, Office of Counsel, Aug. 21, 1986.

3. *Benefits.*

Such an approach obviously can save time and money, though the benefits are difficult to quantify.[132] It can also be particularly helpful to parties seeking a sensible "business" solution, who can benefit from advice on how the case might be decided in court. The disadvantage is that, once again, a judge's time is being used for something other than hearing cases. If the case does not settle, the extra step has engaged the time of *two* judges, and may, therefore, prove more inefficient than simply litigating the case the first time around. Some argue also that it may be dangerous for a judicial figure to undertake to produce settlements on the basis of very limited information; they fear an influence disproportionate to his or her actual knowledge.

4. *Mandatory Use of Settlement Judges?*

Though agencies should provide by rule for use of settlement judges, only certain types of cases and parties will be susceptible to settlement. Mandatory settlement conferences in all cases may be too drastic. If settlement judges were ubiquitous, parties might start routinely gaming the settlement conferences as well as the trial. Nonetheless, presiding and chief judges should regularly examine their dockets and not hesitate to suggest use of a settlement judge whenever appropriate; since parties often are hesitant to raise settlement themselves for fear of appearing "weak," a judge can be quite effective in focusing parties' attentions on their mutual interests. And, if they do nothing else, boards should always inform all parties that a settlement judge will be made available in any cases where a party requests it.[133]

E. Arbitration

1. *Defined.*

Arbitration is a flexible procedure where the disputants present their cases to a neutral third party, usually selected by mutual agreement, who hears the evidence and decides the award. Arbitration may be binding or non-binding. If binding, the parties must abide by the arbitrator's award unless a party appeals, which can be done only under a highly circumscribed standard of review. If non-binding, parties are free to accept or refuse the arbitrator's recommended decision. Arbitration is typically initiated in one of three ways: (1) the parties agree before a conflict arises to submit all disputes to arbitration; (2) the parties agree to submit to arbitration after the dispute arises; or (3) a court, agency, or statute mandates that the dispute be arbitrated.

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[132] *See* G. Bingham, *Resolving Environmental Disputes* (1986), for an excellent discussion of problems in measuring the costs and benefits of ADR.

[133] *See* Administrative Conference Recommendations 86-3 and 86-7, 1 CFR § 305.86-3 and 86-7.

2. *Procedure and Experience.*

The exact procedure for presenting the case depends upon the arbitration agreement between the parties, but it always involves an arbitrator who hears evidence and renders an award. Procedure is informal, with limited discovery and relaxed evidentiary rules. An arbitrator's award is usually a one or two sentence conclusion. At most it will be accompanied by an abbreviated review of facts and the legal basis for the opinion, rather than by a lengthy opinion. The arbitrator usually has technical knowledge of the area, and often has a legal background. He renders his decision pursuant to a standard chosen by the parties, which may simply be the law of a certain jurisdiction, the provisions of the contract, or even the arbitrator's own sense of justice.

3. *Advantages and Disadvantages.*

Ideally, arbitration can be an expedited process that can save the parties significant time and money, although occasionally extensive proceedings can be involved. It is particularly useful when the parties have an ongoing business relation, as is the case with the government and most contractors. Since discovery is often curtailed and the hearing itself can be simpler than a judicial hearing employing all the rules of evidence, an arbitration often takes less time and money than a traditional trial. Moreover, the use of an expert cuts down on the time needed to educate the decision-maker on the technical issues, and may lead to a more well-informed decision. A further advantage of arbitration is that it need not always be a public procedure, thus allowing the parties to protect trade secrets. Lastly, the quite limited scope of review gives arbitration awards greater finality than most judicial or agency decisions. The main disadvantage of this technique is that in many cases it can be almost, or just, as slow and costly as a formal adjudication.

While many government contract disputes would seem well suited to arbitration, and indeed, this alternative has been seriously considered, it has not yet been adopted. An Interdepartmental Board created in 1921 by the Director of the Bureau of the Budget to standardize government contract forms considered, but rejected, both establishment of a central appeals board and use of arbitration in contractors' appeals from the decisions of contracting officers. Objections included the apparent need for authorizing legislation and that these processes would deprive the department head of the control necessary to discharge his statutory responsibilities.[134]

During World War II, arbitration was again considered, but agency boards were developed instead. Several obstacles have prevented the use of arbitration to resolve government contract disputes. The Interior Board in 1981 ruled that agencies cannot submit contract disputes to arbitration, at least where the contract's dispute clause requires otherwise--as all now do.[135] A more long-standing roadblock has been a series of opinions the Comptroller General, who has been determined that the government cannot be bound by arbitration unless the agency is specifically authorized by statute to engage in arbitration or the arbitration is limited to factfinding. This view is based largely on a fear of improper decisions by arbitrators who may not be well informed on government appropriations and expenditure laws. The Administrative Conference of the United States and many others have criticized this view and has called for Congress to overturn it.[136] Finally, while Articles II and III of the Constitution may restrict some government uses of arbitration, in most cases agencies and Congress should be able to safeguard the process to avoid these problems.[137]

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[134] *See Disputes and Appeals* 48-49.

[135] *Dames and Moore, Inc.,* IBCA No. 1308-10-79, 81-2 BCA 76, 393 (Oct. 27, 1981).

[136] Administrative Conference 86-3, 1 CFR § 305.86-3; Harter, 1986 Recommendations and Reports of the Administrative Conference of the U.S. (hereinafter *1986 ACUS*); *ADR Sourcebook*, p. 309 (1987); Hardy & Cargill, *Resolving Government Contracts Disputes: Why*

In addition to these legal obstacles, there are some practical problems with arbitration. Arbitrations are not always speedy, lack some of the "quality control" of trials because they are not documented as well and less subject to public scrutiny. Some fear that arbitral awards may not always accurately reflect the merits of the case, as when the arbitrator simply decides to split the difference between the parties. Arbitration does not generally establish precedent, and although some agencies may choose to employ arbitral awards to create precedents, extensive use of arbitration may lead to some loss of uniformity. Finally, parties may be reluctant to engage in arbitration since the scope of judicial review of awards is limited and they may be stuck with an unsatisfactory and unappealable decision.

Nevertheless, many federal contract cases are, on their face, good candidates for arbitration. These include cases where the standard to be applied has already been established by statute, precedent or rule; where the resolution of the dispute will not have precedential effect or establish major new policies or precedents; where the parties want the arbitrator to base his decision on some general standard without regard to a prevailing norm; where it would be valuable to have a decisionmaker with technical, in addition to legal, knowledge; or where the parties desire privacy.[138] Passing many of these decisions on to arbitrators would presumably free up BCA judges and the Claims Court to focus their managerial and decisional skills on significant cases with precedential or policy implications.

F. Disputes Review Boards

1. Army Corps of Engineers Model.

The South Atlantic Division of the Army Corps of Engineers has developed an ADR procedure to attempt to resolve factual, as opposed to legal, contract disputes at the contracting officer level. At the time the contract is signed, the government and the contractor may agree to create a Disputes Review Board that can review factual disputes arising under the contract. This Board consists of three members, one each representing the government and the contractor, and a third chosen by agreement of the parties. The procedure then allows the contractor who is dissatisfied with a contracting officer's preliminary opinion either to request a final opinion which can then be appealed, or to submit the dispute to the Disputes Review Board with the consent of the government.

If the parties agree to submit the dispute to the Disputes Review Board, they must do so within 30 days of the receipt of the contracting officer's preliminary opinion. At the hearing, both parties present evidence on the dispute to the Board, which then has 30 days to make a factual recommendation. If the parties accept the Board's recommendation, the dispute is considered settled and the government will expeditiously make any required contract modifications. If the parties do not accept the recommendation, the usual dispute resolution procedures are followed.

Not Arbitrate?, 34 Fed. B. J. 1 (1975), *ADR Sourcebook* 351; Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 Public Cont. L. J. 66 (1986). A recent report to the Administrative Conference by Richard K. Berg, *Legal and Structural Obstacles to the Use of Alternative Dispute Resolution in Federal Programs*, (September 1987), argues persuasively that GAO's objections are without legal foundation and unpersuasive.

[137] *See* H. Bruff, *The Constitutionality of Arbitration in Federal Programs*, Report to the Administrative Conference (May 1987); ACUS Recommendations 86-3 and 87-5.

[138] *See* Administrative Conference Recommendation 86-3, 1 CFR § 305.86-3, *ADR Sourcebook*, 113.

2. *Procedures.*

This procedure effectively takes care of disputes early on in the process, and, therefore, saves the parties both time and money and helps keep the BCA's docket clear. It further saves time by creating the Board even before any disputes arise and keeping the Board members up to date on the construction so that they are already acquainted with the project and do not have to be educated on the issues when a dispute does arise. Finally, the Disputes Review Board system addresses the statutory and constitutional problems of ADR by making the Board merely advisory and limiting it to factual disputes. It recognizes that this ADR is not suitable for legal disputes that may have precedential value, and therefore emphasizes that the Board is to make "recommendations towards factual (as opposed to legal) resolution of a dispute. . . ."

3. *Drawbacks.*

One drawback of the procedure is that it allows the parties to second-guess the contracting officer and to essentially disregard his opinion, perhaps without legal authority to do so. Another potential problem with regards to neutrals is that it may not be economically feasible to keep one or more "on tap". Neutrals would be more helpful in large contracts where keeping that individual "up to speed" is a relatively minor expensive compared to the potential claim size.

G. Summary Procedure

1. *Definition and Description.*

Summary procedures for small claims are another alternative to litigation before BCAs. Of course, the "accelerated" and "expedited" processes authorized by the Contract Disputes Act permit abbreviated resolution of small claims.[139] The processes have had some utility, but their monetary limits are too low for them to make a big difference.

2. *Examples.*

A new Navy policy authorizes resolution of small cases singly or in groups via a summary ASBCA process that can be binding. It requires contracting officers, ". . . where appropriate, [to] afford contractors pursuing disputes of $25,000 or less the opportunity to utilize the Summary Binding ASBCA Procedure."[140] "Precedential" cases are excluded. According to the Navy policy, participation is voluntary, but if the parties do agree to participate, they must also waive their right to appeal under the Contract Disputes Act. According to the binding procedure, each party has a limited amount of time, usually one to two hours, in which to present its case to a single BCA judge, who renders a decision from the bench immediately following the presentations.

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[139] The Act requires BCAs to provide for accelerated disposition of cases for claims of $50,000 or less, and to establish expedited simplified procedures for disputes of $10,000 or less. 41 U.S.C. §§ 606(f), 608.

[140] Memo from Everett Pyatt re Navy ADR Program, July 13, 1987. It also provides that a CO decision that a full trial must be pursued shall be reviewed.

Ideally a judge would be able to hear a number such cases in one or a few days, and so help clear the BCA's docket. John Turnquist, Chief Litigation Counsel for the Navy, has proposed organizing a settlement week in which seven or eight judges dispose of 70 - 100 cases in summary proceedings.

Another summary process has been attempted experimentally by the ASBCA. In it, the judge orally issues a brief, final, binding bench decision without preparing the customary written decision. This process, also consensual with the parties, has been used once so far.

3. *Advantages.*

While the advantages of a summary process are readily apparent, the chief drawback is that it uses already overloaded BCA judges to resolve the cases. While some argue that it is better to use a week of a judge's time to resolve ten small cases than to let those cases wallow in litigation, others feel that BCA judges can better spend their time working through the Board's docket rather than resolving small cases. Another criticism is that summary procedure is merely a thinly veiled attempt to engage in arbitration that may be statutorily prohibited; this attack, however, is without foundation since the deciders remain BCA judges. The principal problem of this proposal is simply that a "settlement week" is very hard to schedule, and anything less may be inefficient.

H. Case Management

1. *Benefits.*

"ADR, techniques in the hands of judges, no matter how well-trained and well-intended, will not significantly reduce cost or delay nor enhance litigant satisfaction unless they are premised upon a system that encourages and effectuates judicial management."[141] Keeping track of caseloads and focusing parties' efforts help to create a "culture" where timeliness, rather than extensions, becomes the norm. Both the Administrative Conference and the A.B.A.'s Public Contracts Section have called for greater use of case management as a tool.[142] The Federal Trade Commission, for instance, has adopted a mandatory "fast-track" rule for all cases pending before its administrative law judges. Before a party files a petition or motion it must have made a good faith effort to settle the case or at least to narrow the issues. Prior to the required scheduling conference, the parties must exchange non-binding statements of claims and defenses. The ALJ is then required to set a trial date for no more than six months from the time of the scheduling conference.

2. *Experience.*

The Grant Appeals Board (GAB) of the Department of Health and Human Services makes use of a number of interrelated procedures to create an even more interventionist case management model.[143] For example, the Board tries to consolidate appeals involving common questions of law or fact so that a single hearing suffices for all. The Board periodically gives parties specific procedural directions to help them speed up the process. They also may ask a party to clarify an argument or position if it is not clear to the judge, or to submit further factual or legal evidence to help develop the record. Following up on such issues, the judge frequently uses written questions as the framework for the hearing. "Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the Member will ordinarily structure the conference or hearing as a forum for addressing these ambiguities."[144]

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[141] *Dispute Resolution in Massachusetts* 32.

[142] Administrative Conference Recommendation 86-7, 1 CFR § 305.86-7; *Expediting Contract Appeals.*

[143] *See* R. Cappalli, *Model for Case Management: The Grant Appeals Board*, 1986 ACUS 663 (1987).

3. *Approaches.*

Another method of case management is to have the judge early in the litigation formulate the issues to be decided rather than to let them emerge slowly during the pretrial phase. GAB members also employ warnings and sanctions to encourage compliance with time limits, and issue orders to show cause why a sanction should not be imposed or a preliminary finding not finalized. Another tactic is to encourage as many stipulations of fact as possible, which often forces parties to recognize the merits of their cases, and occasionally to pressure parties to concede certain points, or even entire claims. On occasion the Board specifically invites the parties to brief particularly complicated or important issues of law, which helps the Board make an informed decision. Sometimes a party knows that it will lose its appeal because of a governing precedent, and simply wants to exhaust its administrative remedy as quickly as possible so that he may bring suit in federal court. In such cases the GAB is perfectly willing to issue a one or two paragraph summary decision.

Many of these case management techniques are already used at a few boards to speed up the resolution of government contract disputes. In the view of many judges and lawyers, however, these approaches require significant time and energy that BCA judges do not have. Case management also posits an active judicial role in framing cases for litigation that some may feel inappropriate and may even hinder justice. As these perspectives make clear, case management should not become a fetish. Nevertheless the trend, in federal district courts for instance, clearly is in favor of these methods. Given the likelihood of continued growth in caseloads and stable board sizes, case management may become a necessary a tool for all boards, and certainly merits a close look.[145]

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[144] *Id.* at 88.

[145] Besides the Cappalli report, a 1983 study for the Administrative Conference by Charles Pou and Charlotte Jones examines the varying ways in which several agencies have made use of some of these devices. *Agency Time Limits as a Tool for Reducing Regulatory Delay*, 1986 ACUS 835 (1987). This report, and the cases and articles it discusses, suggest that agencies possess the authority to develop and enforce criteria for ensuring expeditious disposition of cases by ALJs and BCA judges.

IV

IMPLEMENTING ADR IN GOVERNMENT CONTRACT APPEALS

A. When Does ADR Work Best?

1. Appropriate Issues.

ADR has resolved a broad range of technical, monetary, and responsibility questions between contractors and procurement agencies.[146] For example a variety of contracts and issues have been involved in cases using the minitrial format so far. The first case involved a dispute regarding a highly technical satellite communications system at NASA. The Army Corps of Engineers minitrials have involved disputes over a variety of construction problems. The Navy's first two involved both auditing and legal issues with the same contractor (the specifics of which have remained confidential among the parties), while the third involved an overhead cost allocation suit. The Department of Energy minitrial dealt with a subcontractor's claim based on delayed access and inadequate drawings.

Many interviewees felt that all dispute cases are potentially appropriate for ADR use, except those clearly turning on legal issues.[147] The Corps "Tenn-Tom" minitrial showed that ADR techniques can be used effectively even when the issues in dispute are highly complex.[148] Many observers saw ADR, if implemented properly, as a useful alternative to litigation in the resolution of contract claims disputes in these situations: (1) where there is a close factual question as to entitlement, and experts support both the government's and contractor's position, (2) where agreement has been reached as to entitlement, but the parties cannot agree on quantum, and (3) where legal or technical staff presents an overzealous assessment of the government's position. The minitrial can demonstrate to the CO or other principal the weaknesses, as well as strengths of the governments position which would enable the CO better to assess the merits of the claim.[149]

Substantively, the cases most often cited as appropriate for minitrial consideration are differing site disputes where the parties disagree on the conditions of the site; disputes arising from the agency changing the required work of the contract; defects in contract specifications with which the contractor finds impossible to comply;[150] defective pricing audits;[151] and disputes over construction and ship repair contracts. The minitrial process is unlikely to be useful where contractor fraud is alleged.

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[146] *See* Appendix B.

[147] Interview with Paul Killian, Esq., July 10, 1987

[148] "DOD Deputy IG Endorses ADR", *Federal Acquisition Report*, vol. IV, no. 8, Aug. 1987 (Derek J. Vander Schaaf's comments at ACUS *ADR Colloquium*).

[149] After-action report, ASBCA Minitrial No. 28767, Dec. 20, 1984 prepared by trial attorney, Major Northrop, Mobile District, Army Corps of Engineers.

[150] "Federal Reclamation Bureau Soon to Adopt an ADR Policy", *Alternatives to the High Cost of Litigation*, vol.5, no.2 (Feb. 1987, CPR).

[151] "DOD Depute IG Endorses ADR", *Federal Acquisition Report*, Vol. IV, No. 8, Aug. 1987.

2. *Case Size.*

It has been suggested that there be some minimum amount in controversy below which the value of the minitrial is exceeded by costs. Because ADR options are at such an experimental stage, quantitative evaluations of this nature would have a weak empirical foundation. It would be very difficult to compare the costs of ADR as compared to the costs of going directly to the board or court, because these three dispute resolution arenas cannot easily be compared. It is difficult to assess whether and how a dispute settled by ADR, might have been settled otherwise. Therefore, the size at which the case is deemed appropriate for ADR settlement would be hard to pinpoint and will best be determined by the parties in a particular dispute. While agencies might want to set up some standards, these would have to be quite flexible given the variations possible.

3. *Timing.*

The general feeling is that it is better to agree to ADR sooner rather than later, in order to curtail discovery--the chief cause of expense and delay.[152] In addition, the sooner in the process the parties get together to negotiate, the less rigid they are likely to be in discussing their cases, and the greater the possibility of a mutually acceptable settlement. Another related consideration, especially for the government, is the reaction of the staff. The longer a team has been preparing and conducting discovery on a case, the less willing its members may be to accept a quick settlement decision, in part because they will feel more knowledgeable about the dispute than the principal.[153]

For instance, minitrials have been conducted at all stages of the appeals process. Some have taken place before the parties responded to initial interrogatories, a number occurred after significant discovery, and one, the above-mentioned Boecon case, took place after a six-week Board hearing. It may also be possible to have minitrials even before a final decision by the contracting officer, or after the decision but before an appeal is filed. Since cases typically present several settlement "windows" as they progress, regular review can help find apt subjects for ADR.

Thought certainly should be given to using ADR, including minitrials, at the contracting officer level.[154] While the present report focuses on the appeals level, there is no contradiction between employing these methods at both the CO and BCA stages.[155] Obviously, backlogs at the BCAs would be alleviated by having COs settle more cases.[156] The earlier that disputed contractual issues are brought to the CO's attention, the earlier and more readily they can be resolved.[157] Parties, often less entrenched and more cognizant of what the dispute was about in the first place, would have a chance to deal with their problems directly, and promptly. For these reasons, many have suggested implementing these devices before cases get to the boards.[158]

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[152] *See e.g.*, Killian & Mancini, *Mini-Trials - Basic Principles and Guidelines*, Construction Briefings, March 1985, at 4.

[153] This happened in the Corps' Tenn-Tom case, where an unhappy staff member used the "hotline" to request an Inspector General's investigation into the process and settlement. *See* Appendix B.

[154] Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987

[155] The only drawback to simultaneous minitrials at these two levels would be the appearance of a duplication of effort. Some agencies might not be able to fiscally justify such a dual effort.

[156] Interview with Chairman (ret.), Armed Services Board of Contract Appeals, and Senior Judge (ret.), U.S. Claims Court, Louis Spector, June 17, 1987.

[157] Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987.

Some observers, seeing an erosion in recent years of many COs' managerial authority, wonder whether this may inhibit their willingness to go out on a limb by negotiating a compromise. COs need their agencies behind them on these decisions.[159] A recent A.B.A. report states:

> "'The CO should have the authority to fulfill the mission of contracting in the most efficient and economical way, while assuring that the spirit and intent of the law is faithfully implemented.' By contrast to this ideal of discretionary authority, . . . the current DOD acquisition system 'blankets the CO with oversight, laws and regulations. The magnitude of new laws has thrown a shadow on the contracting officer's authority and the pace of change is too swift to be effectively absorbed and implemented'. . . 'In this atmosphere of intense oversight and close regulation, correct procedure becomes more important than substantive success in acquisition . . . CO's can be so confined by compliance with regulations . . . that they are afraid to express ideas and afraid to act beyond their familiar routines'. To make matters worse, the rapid rate of statutory and regulatory change makes past training increasingly obsolete." [160]

Even so, and even if less objective than someone higher up, often a CO will be potentially the best principal. One way to get the CO involved in the minitrial is to make the CO the government's principal; if the minitrial takes place before the CO's decision, the CO could present the settlement as his decision; if the minitrial occurs after the CO's decision, the CO can always change his mind and reconsider his decision[161]; if both parties are satisfied with the settlement and the CO's subsequent decision, there should be no complaints about improper influence. Minitrials seem to present far fewer concerns over improper influence on COs, though sticklers may wonder if informal advice from a BCA judge acting as a neutral can be disregarded.[162]

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[158] After-action report, ASBCA Minitrial No. 28767, Dec. 20, 1984 prepared by trial attorney, Major Northrop, Mobile District, Army Corps of Engineers. It is worth noting that the report of the Commission on Government Procurement recommended a new level of claim consideration where an informal review would occur in any case that a CO's decision was adverse to the contractor. The review would have allowed the agency to correct or amend some CO decisions before the contractor commenced litigation, and would have focused on the CO's justification for the adverse decision and settlement possibilities. CO decisions were to be submitted to a higher level agency official, who was not involved in the contract's administration, for purposes of injecting an element of neutrality into the attempted settlement. It was also suggested that the conference be held prior to the CO's decision, before the parties became settled in their positions. Notwithstanding contractor support, Congress deleted the notion of a settlement conference because it was thought to undermine the negotiating position of the CO.

[159] Interview with Chairman (ret.), Armed Services Board of Contract Appeals, and Senior Judge (ret.), U.S. Claims Court, Louis Spector, June 17, 1987

[160] R.J. Bednar & J.T. Jones, *The DOD Contracting Officer*, Report of an ABA Public Contracts Section Subcommittee, (1987), Federal Acquisition Report, Vol. IV, no. 8 (Aug. 1987).

[161] According to Robert T. Peacock, *A Complete Guide to the Contract Disputes Act* (1986), at 40, "the CO may reconsider or amend a decision even after a timely appeal has been taken." *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA Sec. 15,766; *Watson, Rice and Co.*, AGBCA No. 82-126-3, 82-2 BCA Sec. 16,009."

[162] In one case, *Pacific Architects and Engineers Inc. v. U.S.*, 491 F.2d 734 (1974), concerns a CO's decision which the plaintiffs alleged was unduly influenced by the legal advice of a government lawyer. The FAR 33.211(a)(2), promulgated in 1983, states that the CO "shall secure assistance from legal and other advisors." Thus, a CO should be allowed to

B. Negotiating and Living with ADR Settlements

1. The Negotiation Process.

During settlement negotiations, the principals have typically met alone to weigh the merits of the case and discuss areas of compromise. Many have been advised by their technical advisors and counsel on the legal issues; advised by experts on technical issues; advised by auditors on the quantum aspects of the case; and advised by the neutral advisor on the merits of the case, as well as the probable outcome at trial. No transcripts are kept of these proceedings. At most, intra-agency documents are prepared after the fact, explaining and justifying the outcome and perhaps describing the process for evaluative purposes.[163]

2. Review or Approval of Settlements.

Generally there is no follow-up review of the ADR settlement, as the principals must have prior authority from the agencies to settle the case. These principals must have the confidence that their agencies are behind them to settle the case with the best interest of the government in mind. One dispute settlement was brought to the attention of the agency Inspector General by an agency subordinate who felt that agency's principal had given in too easily in the minitrial negotiations. The IG's report generally endorsed the process, determining that the parties in this case acted in the best interest of the government but that greater justification should be provided for settlement decisions.[164]

An IG generally should not become involved while an ADR settlement is in progress; the IG's role in preserving accountability can best be performed less intrusively. IG reviews of these activities should be approached with caution, as excessive post-review of settlement outcomes could undermine the potential for further use. Conceivably, some liaison by the principal with the auditors for the agency (e.g. Defense Contract Audit Agency) prior to the actual initiation of the procedures may occasionally be useful. The auditors might, on request, review a case agencies have deemed appropriate for settlement, and provide quantum data for the principals in order to assist with the settlement process. The auditors may also offer guidance on appropriate levels of documentation for settlements, hopefully taking into account considerations of both accountability and flexibility.

In some cases, Congress might also feel the need to second-guess settlement decisions. An extreme example is *Blackhawk Heating and Plumbing Co. v. U.S.*,[165] discussed above in connection with use of BCA judges as minitrial neutrals. In that situation, Congress questioned the settlement, urged the VA Administrator not to pay it, and ultimately forbade payment of the full settlement amount. While agencies must act carefully with ADR to avoid

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get advice from the BCA member acting as a neutral. Another case, *Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (1983), addressed the issue of congressional pressure on such a decisionmaker, finding it, without proof of effect on the outcome, enough to vacate a decision.

[163] Interview with Frank Carr, Army Corps of Engineers (June 18, 1987).

[164] The only other post-settlement agency reviews have been evaluations of their ADR programs and policies. This general assessment is useful to policy makers seeking to improve the process, and should help assure that the governments interest is served.

[165] 622 F.2d 539 (1980).

indefensible settlements and to provide oversight entities with an accurate view of the costs and benefits of their ADR uses, members of Congress must also assume responsibility for a level of review that recognizes the need for compromise in many disputes and the transaction costs of formal adjudication.

3. *Documentation.*

The agency ADR procedure should almost always provide for some brief documentation to justify the settlement reached. This would improve accountability, especially for cases involving large dollar amounts, and would ultimately lessen the probability of any investigation. This need for rational settlement must be balanced by the fact that the primary appeal of ADR is its informality. Also, the assurance of privacy in the negotiation process is essential. If the details of the negotiation process became common knowledge, criticism from both sides might increase and inhibit future negotiations. In short, if the process were too open, the incentive for using ADR would be gone.

The level of documentation will depend on for whom it is being created. If it is created for oversight on the part of individuals outside of the agency, not much detail would be apt. If it is created for in-house use, as is more likely, the principal or his advisor should set down cost and other factors taken into consideration, any pre-negotiation positions developed, and a statement justifying acceptance of the compromise; in short, a reflection of the thought process or rationale of government officials who agreed to the settlement. Interviews with IG personnel suggest that this documentation will not significantly exceed what would ordinarily be used to justify negotiated settlements of government contract disputes. A price negotiation memoranda would typically be adequate. Justification should be written after the fact so that ongoing negotiations are not jeopardized or delayed. The neutral could help the parties draw up the justification memo, or offer an advisory decision in a potentially sensitive case.[166]

C. Agency Policies

Despite the initial apparent success of ADR procedures, widespread use has not resulted. To those in the bureaucracy, this is understandable; most public officials are adverse to change. Lessening the backlog of cases is often not incentive enough for officials to risk a new procedure by using ADR tools. Innovative policies must therefore balance a variety of interests and concerns. These include parties' needs to resolve disputes, so that they can refocus personnel and resources on more pressing matters; maintenance of positive ongoing relationships; finality in decisions; needs for accountability; and procedural fairness.

Probably the simplest way for an agency or board to implement ADR in the contracts litigation process is to write and distribute a policy encouraging contracting officers and BCA judges to explore ADR. It should state clearly that high-level agency officers, or the board, support such initiatives and place the responsibility for these implementing policies or rules with contracting officers, government counsel, and judges. OFPP should encourage development of such advice via its guidance; a presidential executive order and changes in the FAR encouraging ADR are also warranted.

An ADR policy can give both government officials and private contractors the encouragement they need to experiment with these techniques. One consideration holding parties back from any kind of ADR, for instance, is the possibility that one's opponent might take willingness to settle as a sign of weakness. An agency can avoid this problem by making it a policy to review systematically *all* cases for settlement potential, thereby avoiding the impression, however unfounded, that it will only consider ADR in a weak case. This statement should thus make it clear that not all cases need be litigated, that choosing to settle rather than litigate is often a sign of reasonableness, and that the responsible agency officials will support settlement's reached via duly selected ADR methods.

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[166] Interview with Derek J. Vander Schaaf (DOD OIG), May 27, 1987.

An ADR susceptibility review should be done by persons experienced or familiar with its potential success. However, many agencies do not have such individuals. The BCA might be an appropriate starting place for such an endeavor because these judges are most familiar with different types of disputes and with managing the docket caseload.

The policy statements of the Corps of Engineers, the Navy, the Justice Department and the Claims Court essentially outline their recommended ADR procedures. The policies emphasize the voluntary nature of the procedures, as they eschew strict guidelines, and do not require that anything in particular be done. They do establish who has authority to approve the selection of a case for ADR consideration. These policies offer guidelines on many of the issues discussed in the previous sections of this study, such as case selection, representatives, neutrals, and the nature of the agreement, process and negotiation. The guidelines are usually fairly loose, as they should be, and allow the parties to design a procedure most appropriate for the particular case. For example, the South Atlantic Division of the Corps of Engineers has its own minitrial policy in addition to that of the Corps. Yet in the Granite Construction case, the parties combined elements of the two policies into yet a third kind of ADR procedure.[167]

An important question to be addressed in formulating a specific policy is what roles the agency's BCA and COs should play in the minitrial or other ADR process. The whole point of ADR is to avoid litigation, and it seems logical to try to implement minitrials before the BCA is even involved in the case.[168] This saves the parties time, clears the board's docket for cases that should be litigated, and avoids some possible formalism and institutionalization that the board might impose. The policy should not transfer control over the structure of the ADR process from the parties to the judge.[169] However, a policy implemented by the board may imbue the process with added legitimacy in the eyes of Inspectors General and Congress. Furthermore, the board's formal approval of a settlement finalizes the issue, and can protect it from second-guessing by the agency or Congress. Finally, judges may well prefer to issue their own policy rather than have one imposed upon them in the interest of preserving their independence.[170]

D. Rule Changes

In addition to implementing dispute resolution policies, contracting agencies and their BCAs should consider in their rules of practice changes to encourage the use of ADR. While agencies should be careful not to over institutionalize ADR--lest it become part of the problem rather than part of the solution--a rule requiring CO decisions to alert appellants to ADR possibilities and parties to explore the possibility of ADR would ensure that they realize the alternative is available. In many disputes, this may be all the parties need to commence a process leading to settlement. If done early in a case, savings would be dramatic. Such a rule could be especially helpful to larger BCAs in getting the word out to judges to think about ADR and to help implement the agency's ADR policy. In the long run, rule changes to encourage ADR could help to make these techniques a more common and accepted procedure.

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[167] *See* Appendix B (Agency Initiatives to Date).

[168] Indeed, arbitration would substitute a private decider in less important, nonprecedential disputes.

[169] Interview with Paul Killian, Esq., July 10, 1987.

[170] 41 U.S.C. 607(b)(1) (BCA judges are appointed in the same manner as ALJs).

There are, of course, some drawbacks to innovating through rule changes. Adoption of a new rule can be extremely laborious, with some boards--notably the ASBCA-- requiring a burdensome high-level sign-off procedure. Furthermore, rules often lead to unwanted formalism as parties adhere only to the letter of the law, and demand explicit authority to adopt any procedure not specifically enumerated. Rule changes may not be needed for smaller BCAs, where communication among the judges and litigants may be more immediate and the agency's ADR policy may be better known than at the larger boards. Nonetheless a rule is worth considering, since it would also indicate an agency commitment to procedural innovation, give BCA judges clear authority to encourage ADR, and send a message to contract officials and contractors.

A rule on ADR should (1) authorize and encourage agency officers to make use of alternative means of dispute resolution; (2) make provisions for automatically alerting the parties, both at the CO level and as soon as an appeal is filed, that one or more ADR methods is available;[171] (3) authorize a judge to encourage its use and to require the attendance at any conference held for the purposes of proposing or implementing ADR, of at least one representative of each party who has authority to settle all matters; (4) briefly describe the alternatives; and (5) authorize the parties to agree to vary any procedural rule in their case. While it is likely that administrative judges and officials already have these powers,[172] explicit authorization would certainly allay any doubts and encourage greater use.

Changes can be made to the procedural rules of each individual agency or board, or to the government-wide central regulations and guidelines.[173]. A section of the A.B.A., for example, is considering a recommendation to change the ASBCA rules to authorize the Board to call a conference to consider the possibility of agreement *or alternative dispute resolution procedures which might dispose* of any or all of the issues in dispute.[174] Such an addition to the rules of the ASBCA or other boards could make a substantial difference in the resolution of contract disputes, as would a policy encouraging presiding or settlement judges to raise ADR possibilities.

A more sweeping rule change would allow a BCA judge to impose sanctions on a party for unjustifiably refusing to participate in settlement efforts. This would mirror some draft legislation and proposed FRCP changes that would provide that any party who fails to participate in good faith in any settlement conference might be sanctioned. Again, in all likelihood BCA members now have the authority to impose santions for failure to participate in good faith once a party has agreed to do so, but a rule should be considered to make that authority clear. Doing any more than this might lessen the voluntariness of ADR use and scare off some.

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[171] Many interviewees recommend including a statement on the ADR alternative in the docketing notice. *E.g.*, Interview with Emanuel P. Snyder, Chief Judge of Transportation BCA, May 4, 1987; interview with Judges David Doane and Russell C. Lynch, Interior BCA, July 17, 1987. The Claims Court has done precisely this in its notice to counsel explaining the operation of its minitrial and settlement judge policies. *See* Appendix C.

[172] Some federal district courts have mandated exploration of ADR use by rule, and have even made mediation or arbitration mandatory in certain kinds of cases.

[173] Strong arguments can be made for issuance at the agency level, as opposed to the sub-agency (e.g., Corps or Navy) or board level. As a practical matter, though, agency rules at any level are likely to suffice.

[174] A.B.A. Alternate Disputes Resolution Committee of the Section of Public Contract Law draft recommendations covering the use of ADR procedures by the ASBCA, April 8, 1987. The italicized section is the proposed change to ASBCA Rule 10(a)(5), 48 CFR Ch. 2, App. A.

Multinational Legal Services, P.C. ("MLS"), a Washington consulting firm, has taken a different approach, recommending to the Office of Federal Procurement Policy ("OFPP") that the Federal Acquisition Regulation ("FAR") be changed to encourage settlement through ADR. MLS proposes adding the following paragraph to FAR 33.204, which states the government's policy to try to resolve all contractual disputes by mutual agreement:

> Specifically, the contracting officer, before issuing a decision likely to be unacceptable to the claimant, shall recommend to the non-Government parties and the representatives of the Government involved in the dispute that they seek to resolve their differences by methods other than litigation and that they agree on an alternative method of dispute resolution (ADR), such as a minitrial, mediation, arbitration, a settlement judge or administrative judge or some other neutral person, a two-team settlement process, or some other method of ADR as promises an agreed resolution of the dispute without the litigation following upon a decision of the contracting officer on the claim of the non-Government party.[175]

MLS argues that this regulation change will do three things: (1) "[I]t will unambiguously affirm that ADR is as much or more the policy of the United States as is litigation...." (2) "[I]t introduces ADR at the contracting officer's level -- *before* the parties have been caught up in a formal 'dispute', with pleadings, briefs, subpoenas and depositions...." And (3) "[T]he benefits of resolution by ADR of many disputes will, in turn, speed up the progress of those other cases requiring formal litigation."[176] The notion of greater OFPP and FAR guidance strongly supporting use of ADR at both the CO and BCA stages has great merit.

In conclusion, it must be emphasized that any rule changes should be broad and permissive; they must neither add more layers to the resolution process, nor detract seriously from the voluntary nature of ADR.

E. Contract Clauses

Still another means of ADR implementation in the contract process is to write a broad ADR clause into government contracts. Such a clause alerts the parties to the alternative even before a dispute arises and may make it easier to raise and implement the procedure later. Standard and optional dispute resolution clauses authorizing ADR should be prepared for agency use.[177]

F. Statutory Changes

It does not appear from interviews with a variety of experts that there are major statutory obstacles in the Administrative Procedure Act or the CDA to using any form of

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[175] Multinational Legal Services, P.C. letter to Robert P. Bedell, Administrator, OFFPP, March 31, 1987.

[176] *Id.*

[177] Recently the Army Corps of Engineers South Atlantic Division inadvertently conducted an experiment of sorts when it accidently inserted a voluntary alternative disputes review process clause in four solicitations. The Corps had decided not to include the clause for fear that even though the language specifically provided that the process was voluntary, it might have resulted in higher bids. (Memorandum from Stephen Lingenfelter, South Atlantic Division Counsel, to Lester Edelman, May 8 1987. For a sample minitrial clause in a contract between private parties, see Killian & Mancini, *supra* note 152, at 20.) We do not have any information on whether the clause did in fact have an impact, but agencies should consider the possibility.

ADR (except perhaps binding arbitration)[178] to resolve government contract disputes.[179] Legislation, however, would give agencies and boards a strong policy signal, clear authority, and an incentive to use these well-tested techniques, as well as eliminate any existing ambiguity as to agency power to engage in these common sense procedures in fitting cases. Several other policy changes may be beneficial. First, COs should be encouraged to settle cases. Second, as repeatedly recommended by the Administrative Conference and others,[180] Congress should authorize use of arbitration in contract disputes at the agency's sound discretion.[181] At a bare minimum, some consideration should be given in appropriations decisions to funding for training and outreach programs to increase agency use of ADR and for payment to neutrals who help resolve contract claims promptly.

G. Training and Outreach

Training of, and outreach to, the contracting community is vital to promoting ADR in the government contracts field. Judges and neutrals should receive training in mediation and other ADR skills to help facilitate the procedures. Agency personnel must be educated about both the existence of ADR and how properly to use it. Private contractors must be made aware of alternatives, and must be assured these are fair and efficient and not just another onerous system of adjudication.

1. Training.

A number of interviewees felt that many BCA judges do not have adequate training in case management and mediation to either help them act as a neutral in a minitrial, or even to comprehend fully what ADR is all about. This is also true for the vast majority of contracting officers. The Navy, for example, does not provide any formal training to its personnel, but discusses the procedure case by case as the situation arises.[182] Providing training to its personnel should, therefore, be one of each agency's priorities.

Judges have a variety of concerns regarding ADR in general and minitrials specifically; these include resolving disputes as efficiently and accurately as possible, lessening their caseload, and preserving their independence and neutrality. Some ALJs view various ADR experiments with apparent resistance. It has been reported that many BCA judges are unwilling to "manage" hearings or to resolve cases in the most expeditious way, viewing themselves as onlookers who ultimately make the decision.[183] This view could be changed by their participation in developing and overseeing any new rules, regulations or policies on ADR within their agencies. In this way they will be an active part of the dispute resolution solution. Efforts must be made to demonstrate that the short term burden of case ADR review is worth the long term goals of increased settlements, at an expedited pace, with the result of better overall case management.

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[178] *See* issues raised in the articles by Harold Bruff and Richard Berg, discussed in Section III.E., above.

[179] *See e.g.* Multinational Legal Services letter to Robert P. Bedell, Mar. 31, 1987, at 3. (We believe that there is no legal obstacle to an ADR solution to a dispute before or after the contracting officer makes his decision. If it occurs before the contracting officer's decision, the alternative resolution simply becomes the contracting officer's decision; if after his decision, it becomes the settlement agreement with the agency.")

[180] The Conference called on Congress to allow agency arbitration in Administrative Conference Recommendations 86-3 and 87-5, 1 CFR §§ 305.86-3 and .87-5. The Administrative Law Section of the A.B.A. this year approved a resolution virtually identical to Recommendation 86-3.

[181] At the least, parties should be authorized to agree to arbitrate non-precedential disputes that have arisen. Arbitration clauses in acquisition contracts pose more substantial concerns, and are less clearly desirable.

[182] Interview with C. John Turnquist, June 19, 1987.

Training for government personnel can be accomplished in a number of ways. The Federal Mediation and Conciliation Service ("FMCS") or others could conduct courses at the agencies, focusing on whichever ADR method the agency deems appropriate. Private organizations like the American Arbitration Association ("AAA") and the Center for Public Resources ("CPR") could also provide valuable training. The Board of Contract Appeals Judges Association and other professional organizations could also sponsor seminars on ADR for judges. Still another possibility is to include ADR in the curriculum at the Defense Weapons System Management College, and other bodies which train contract projects managers. DOD has apparently been more successful training its COs than many other agencies, but GSA is now starting a CO training program.[184] The teaching of ADR skills could be incorporated into these programs.

The designation of a particular agency representative as the ADR specialist would help to expedite its ADR development and better coordinate implementation. Who this specialist might be, what part of the agency he or she might be from, what type of training or experience might be required, what the job description might look like, and how that individual might be compensated, are all issues to be dealt with in considering ADR training and development in federal agencies. For example, currently DOD has no central data base for tracking contract disputes, and thus is unable to identify types of cases that could be uniformly settled using ADR procedures.[185] An agency ADR specialist could administer such a system to expedite the consideration of ADR.

2. *Outreach.*

Many of the participants in the ADR field to whom we have spoken consider that the lack of utilization of these techniques is due, in part, to agency personnel and contractors requiring a greater knowledge of the alternatives. To combat this ignorance, outreach and public relations of the benefits of ADR is strongly encouraged. Education is a slow process, and even the most flexible bureaucrats are slow to change. Others interviewed say there is awareness in the procurement community of ADR but that the problems are institutional impediments to implementation of these alternatives. Therefore, education and outreach efforts would only have a limited effect. There is also debate as to the source of an ADR outreach program. Opinions vary as to whether it should come from within the agency as a directive or from some outside source.

An agency will have a difficult time implementing an ADR policy until it has educated both its own personnel and private contractors. Many are still skeptical about ADR, and must be shown that these techniques have actually worked. Within the government, the education should be focused on BCA judges, contracting officers, counsel, and auditors. Beyond spreading the news by word of mouth, agencies could cooperate with other interested groups to sponsor seminars to educate their personnel on the uses of ADR. The Department of Defense, for instance, is planning to have the Navy give a presentation on its minitrial experiences to personnel from each of the four services.[186]

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[183] Korthals-Altes, *The Applicability of ADR Techniques to Government Defense Contract Disputes*, Harvard University, May 1986, *ADR Sourcebook*, 147.

[184] Interview with Judge David Doane (Interior BCA), July 17, 1987.

[185] "DOD Deputy IG Endorses ADR", Federal Acquisition Report, Vol. IV, No. 8, Aug. 1987.

Professional associations of the aforementioned parties (including BOCAJA, the Armed Services Trial Lawyers Association, and the National Contract Management Association) would be useful for promoting ADR.[187] Private sector participants in the government contract procurement area should be active in ADR development. Other outside actors might want to do follow-up studies and reports of these activities, their success and limitations. Groups like the National Institute for Dispute Resolution ("NIDR"), the Center for Public Resources, Endispute, the American Arbitration Association, the Federal Mediation and Conciliation Service, would be useful organizations for purposes of ADR education and training, as these groups have experience in this area.

Conferences or seminars featuring presentations, working groups, and position papers could be employed to educate people about ADR processes. Participating groups and agencies should include the Administrative Conference, the Board of Contract Appeals Judges Association, the Armed Services Trial Lawyers Association, The Center for Public Resources, The Federal Mediation and Conciliation Service, the Public Contract Law Section of the A.B.A., the Association of General Contractors, and the National Contract Management Association. Such a conference could be directed at both government personnel and private contractors.

There are also other ways to reach the private sector. Something as simple as including an ADR policy statement in the docketing notice could make a big difference. An endorsement of the process by the A.B.A. could also help legitimize and publicize ADR among contractors. The ADR Committee of the A.B.A.'s Section of Public Contract Law has recommended that the Program Committee of the Section and the Section's various divisions conduct educational programs on the Navy's and Corps' ADR procedures, and that particular emphasis be placed on informing and educating small and medium-sized contractors on the existence of these alternatives.[188] The various contractor associations could also help disseminate information on ADR. A number of minitrials conducted by the government have occurred because the contractors had heard of the possiblity and suggested it to the agencies. The better the alternatives are publicized, the more successful any program will be.

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[186] Interview with Eleanor R. Spector (DOD Procurement), July 31, 1987.

[187] Interview with C. Stanley Dees (Chairman, ABA Section on Public Contract Law), July 24, 1987.

[188] Memorandum to former Section Chairman Paul Dembling, April 8, 1987.

V. CONCLUSION

ADR has adapted well to traditional agency decisionmaking formats. Where these methods have been used, they have worked. Apparently, these techniques are flexible enough for a variety of organizational settings, and regulations and policies did not need to be dramatically altered. As a result, some agencies do not see the need for an ADR policy. We disagree. Policies would create greater awareness of ADR proceedings and enhance the probability of their utilization.

To sum up, agencies should adopt policies promoting and encouraging ADR techniques on a voluntary basis. An agency policy should encourage regular review of cases for susceptibility, with caution not to undermine the process with excessive regulations and standardization. The policy should offer advice on how to document the process and justify settlements, to protect decisionmakers and further an effective evaluation of these alternatives. Policies should be supplemented with training and outreach efforts on ADR applications. Whether these efforts will suffice remains to be seen. It is clear, though, that, without these kinds of initiatives, government contract disputes will continue to be handled in a manner that leaves most parties dissatisfied.

APPENDIX A

LESSONS IN CHOOSING AND USING MINITRIALS

1. Deciding to Use a Minitrial

The initiative to use minitrials has come from both contractors and the government, particularly when an agency policy is established. In some cases contractors, having read about a particular agency's interest in minitrials, have approached the agency after an adverse contracting officer's decision and proposed trying a minitrial.[189] In other cases the impetus has come from the agency itself.

The Navy's ADR program places responsibility for identifying cases for ADR with both the Navy trial counsel in charge of reviewing on-going litigation, and with the Navy officials involved with the contract. All decisions to engage in a minitrial must be approved by the General Counsel or his designee.[190] The Navy's recent ADR directive requires that contracting officers review for possible minitrial all disputes involving over $25,000.[191]

The Army Corps of Engineers' has a more decentralized policy that authorizes the Division Counsel to select appeals for minitrial. Once the Division Engineer accepts the minitrial recommendation, he proposes the option to the contractor, and also notifies the government trial attorney and the Chief Trial Attorney in Washington.[192] The Ohio River Division has just implemented a new policy as of August 1, 1987, requiring that all contracting officer decisions within its jurisdiction be reviewed for possible minitrial.

The Department of Justice does not have a formal review process for ADR, but its policy encourages Department attorneys to consider the possibility of a minitrial. Whether proposed by a government attorney or the contractor, "[t]he decision to participate in a minitrial requires the approval of the Deputy Assistant Attorney General in charge of the

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[189] For example, in the Corps' Tenn Tom and Walter T. Dickerson, Inc., cases, the contractor had read about the Corps' minitrial policy, and contacted the Corps with its proposal. Similarly, the Granite Construction Company originally requested that the Corps consider a minitrial. After the Corps' Office of Counsel recommended to the contracting officer that the alternative be explored, and the government and the contractor worked out an agreement. In a few cases, the Corps (and Navy) have rejected cases proposed as unsuitable for minitrial.

[190] *Navy ADR Program*, *ADR Sourcebook*, 848.

[191] Memorandum from Everett Pyatt, Assistant Secretary of the Navy, July 13, 1987.

[192] U.S. Army Corps of Engineers Minitrial Policy, issued in EC 27-1-3, 23 Sept. 1985, expired 30 Sept. 1986, in *ADR Sourcebook*, 703.

Branch and is solely within the discretion of the Department."[193] So far the Department of Justice has not conducted a minitrial.

One minitrial was conducted at the instigation of the presiding BCA judge, after the Department of Energy and Boecon, a subsidiary of Boeing, had completed a year of discovery and a six-week hearing. Reasoning that the inevitable appeal would cost both parties significant time and money, the judge proposed a minitrial; the proposal was approved by the Undersecretary of Energy.[194]

Deciding when to utilize the minitrial screening process is largely a function of each agency's organization. The Corps of Engineers is a decentralized organization and has therefore decided to place the review at the Division level. The Navy, on the other hand, has chosen to keep the final decision in the Office of General Counsel with its Chief Trial Counsel, though contracting officers are now being asked to identify candidate cases. Regardless of when and where the final decision in a case is made, the consensus is that the single most important factor in choosing cases for minitrial is the assurance that the agency stands strongly behind its minitrial policy and supports efforts to implement ADR. Therefore, a number of thoughtful participants and observers have said that the impetus for ADR should come from the top down.[195]

2. *The Minitrial Agreement*

The main distinction of the minitrial procedure is the ability of the parties to make up their own rules so as to tailor them to particular disputes. A "minitrial agreement" between the parties is essential to success, and every minitrial surveyed for this study employed one. Such an agreement not only serves to get the parties talking on matters of procedure, where agreement is more likely and possibly contagious but also to avoid any potentially harmful misunderstandings about scope, procedure or substance.[196] There is no strictly mandated agreement, although the Corps of Engineers, EPA, Department of Justice and the Navy have distributed model minitrial agreements along with their policy statements.[197] General categories for an agreement should include: rules on discovery; roles of the participants, including any neutral participants; exchange of position papers, documents and exhibits; procedure and format of the hearing; possible time limit on the negotiations; fees and expenses; and confidentiality of the proceedings.[198] The agreement should also give each party the right to terminate the minitrial at any time for any reason.[199]

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[193] Commercial Litigation Branch Policy Concerning the Use of Mini-Trials, in Memorandum from Stuart E. Schiffer, Dep. Asst. Attorney General, Civil Division, June 19, 1986, in *ADR Sourcebook*, 827.

[194] *See* Appendix B for details.

[195] *See e.g.*, interview with William Voigt, Jr., Director of the Office of Remedial Action and Waste Technology, June 26, 1987; Office of the Chairman, Administrative Conference of the U.S., An Overview of Federal Agency Use of ADR, *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 Admin. L.J., 405 (1987); remarks of Lee Thomas and Arnold Burns, *id.* at 510, 441.

[196] *See e.g., Report of Subcommittee on Alternate Means of Dispute Resolution, Committee on Corporate Counsel*, A.B.A Section of Litigation, in *ADR Sourcebook*, 253, 260.

[197] *ADR Sourcebook*, 710, 792, 833, 850. *See also* Killian & Mancini, *supra* note 152, at 16-20 (model minitrial agreement between private parties).

[198] For a comprehensive discussion of the pre-minitrial agreement and the confidentiality issue, see Killian & Mancini, *id.*, at 4 - 9.

[199] *E.g.*, minitrial agreement between Corps and Tenn-Tom Constructors, paragraph 18.

3. Conducting the Minitrial

(a) Initial Exchanges A major element of a successful minitrial is the initial exchange of position papers, witness lists, exhibits and stipulations of fact. This saves time because each party knows basically what to expect during the minitrial and therefore, need not spend time on establishing superfluous facts and countering unexpected arguments.

(b) Discovery In order to help the parties to define the issues and to present them to the principals in a coherent and convincing manner, discovery is sometimes, but certainly not always necessary. None of the minitrial participants interviewed, however, felt that discovery, to the extent that it would have been conducted in normal litigation, was necessary. Indeed, all of the pre-minitrial agreements limited discovery in some way by imposing a time limit, limiting additional depositions or by regulating the means of discovery. Limiting discovery to project file and audit reports, exchanges may be a convenient measure worth emulating in minitrials where discovery is permitted.

(c) Basic Process Most minitrials take a day or so--at most three days--to complete, depending on the number and complexity of the issues involved.[200] The usual sequence of events has been as follows: The contractor's attorney first presents his case through oral argument, witnesses and exhibits. The government then has time for cross-examination and rebuttal, after which the contractor may conduct a brief re-examination. This may be followed by a question and answer session for the principals and neutral.[201] The process is then repeated with the parties reversed, after which the principals and neutral retire to negotiate. Depending on the minitrial agreement, a party may have as little as one hour or as much as five hours in which to present its case in chief.[202]

(d) Presenting Evidence The minitrial agreement usually states that the trial attorney can present his case by whatever means he wishes, including oral argument, audio visual and documentary exhibits, and expert and lay witnesses. The minitrial is meant to be an informal proceeding, and the rules of evidence are not enforced. The attorney, therefore, has both the luxury and the burden of essentially briefing the principals and neutral on his position.

The most common method of presentation is to make an opening statement, present the most important testimony through witnesses and exhibits and finish with a closing argument. In several minitrials, such as the Energy-Boecon case, the lawyers did all of the presentation via extended oral argument.[203] Argument can be much more important and effective at a minitrial than at a standard board hearing, because the point of a minitrial is to convince the principals rather than to create a record.[204] Moreover, since the principals are expected to absorb a considerable amount of information in a short time, a good oral argument should effectively emphasize key points. The time constraints of the minitrial also make demonstrative exhibits important. Slides, models, charts and video tapes have been used effectively in a number of minitrials.[205] Without the rules of evidence almost any exhibits are admissible.

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[200] Several observers believe the process should be compressed even further--perhaps two hours per side in some cases, followed by a brief "conference table" question and answer session. "Alternative Disputes Resolution Process Can Be Expanded in Department of Defense, Deputy Inspector General Says," 47 Fed. Contracts Reporter 1128, 1129 (BNA June 22, 1987) (remarks of Ralph C. Nash at ACUS Colloquium).

[201] This may not be necessary in many cases, however, since the principals should be free to ask questions throughout the hearing.

[202] Most sample agency minitrial agreements include a schedule for the hearing, *see* note 15. A typical format is as follows: Day One: 8:30 a.m.- 12:30 p.m.: appellant's case presentation; 12:30 p.m. - 1:30 p.m.: lunch; 1:30 p.m. - 3:00 p.m.: government's cross-examination; 3:00 p.m. - 3:30 p.m.: appellant's re-examination; 3:30 p.m. - 5:30 p.m.: government's presentation. Day Two: 8:30 a.m. - 10:30 a.m.: government's presentation; 10:30 a.m. - 12:00: appellant's cross-examination; 12:00 - 12:30 p.m.: government's re-examination; 12:30 p.m. - 1:30 p.m.: lunch; 1:30 p.m. - 2:00 p.m.: appellant's closing argument; 2:00 p.m. - 2:30 p.m.: government's closing argument; 2:30 p.m. - 5:30 p.m.: settlement negotiations. *See* Minitrial Agreement Between the United States Army Corps of Engineers and W.G. Construction Corporation.

(e) Examining Witnesses The examination of witnesses is usually very different from direct examination in a trial or hearing before a BCA. Since the rules of evidence are waived, the attorney need not worry about establishing a foundation or asking leading questions, but can simply have the witness testify in the narrative. The attorney can even present evidence himself. Thus, basic evidence can be developed far more quickly and concisely than with a formal question and answer format. As one attorney for the Corps of Engineers points out, Corps personnel are accustomed to giving briefings, and he simply lets them give their testimony in essentially briefing style.[206] The principals and neutral should be able to ask questions of the witnesses at any time. In the Tenn-Tom minitrial the principals and neutral "recalled the key witnesses of each party and questioned them simultaneously. In effect, they were able to directly confront each other in discussing the most significant areas of factual disagreement."[207]

Although many minitrial agreements provide some time in the schedule for cross-examination, there is some disagreement about its usefulness. A few argue that some limited cross-examination is typically a good idea since it allows the parties to establish the veracity of the witness.[208] On the other hand, there are a number of arguments against conducting cross examination in a minitrial. Some participants have found that cross examination simply takes too long and is not worth it. Others argue that since much of the information is presented by the attorney, cross-examination is very difficult and adds little to the process.

At the conclusion of the hearing, the principals and neutral begin the negotiation segment of the minitrial. This generally takes between a few hours and a few days.

(f) Administrative Details A number of minitrial participants have made recommendations about running minitrials. If the neutral is to participate actively in the minitrial, the parties should designate another person to coordinate all of the arrangements, ranging from reserving the rooms, to supplying exhibit stands and coffee. One attorney advises that the minitrial take place away from the office so that it will not be interrupted. He further warns that the parties should realize that they may need as many as four rooms - a large room for the hearing, one room for each side for case preparation and discussion, and a smaller room for the negotiations between the principals.[209] The minitrial coordinator must make sure that all necessary equipment and supplies, such as slide projectors, screens and exhibit stands are readily available. Sometimes, the advisor takes on some of these tasks.

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[203] In one private minitrial, counsel had witnesses present, but used them almost exclusively to confirm crucial points. (E.g., question: "Isn't that so?" answer: "Yes.") Interview with Chairman (ret.), Armed Services Board of Contract Appeals, adn Senior Judge (ret.), U.S. Claims Court Louis Spector, June 17, 1987.

[204] Transcripts are almost never made.

[205] *Id. at 4*: "Exhibits are extremely important. Spend whatever time necessary to make your visual aids as clear and dramatic as possible. You have one shot of probably three hours to convince someone of the validity of your position. Visual presentations have great impact under these time constraints. The principals and neutral advisor will focus on the exhibits presented." *See also* Killian & Mancini, *supra* note 152, at 10.

[206] Interview with Wesley Jockisch, July 16, 1987.

[207] Nash, *A New Technique for Settling Disputes - The Mini-Trial* (1985) (unpublished article).

[208] Interview with Frank Carr, June 18, 1987.

The informality of the process can be enhanced by attention to administrative detail. In one case, for instance, the neutral met with the two principals for dinner the night before the minitrial so they could get to know each other. A final but very important detail is the seating arrangement. Administrative expenses may be divided, though in a number of cases the government provides the facilities at no cost.

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[209] Memorandum from Wesley Jockisch to Lester Edelman, Aug. 13, 1985, at 2.

APPENDIX B

AGENCY MINITRIALS TO DATE - CASE STUDIES

NASA

Spacecom/TRW (1982)

Background This was the first time a government agency used a minitrial to settle a contract dispute. In 1976, NASA contracted with Western Union to build a tracking and data relay satellite system (TDRSS) for $786 million, to be deployed by the space shuttle, and Western Union hired TRW, Inc. as its subcontractor. In 1982, Western Union sold its interest in the program to Spacecom. The dispute involved NASA's requests for expertise which it considered to be within the scope of the contract, but which TRW and Spacecom believed to be changes in the contract. TRW and Spacecom filed a complaint in 1979. The parties suspended discovery for three months in 1980 to attempt a settlement, but when that failed the parties renewed litigation and engaged in massive document discovery involving the reproduction of approximately 33,000 pages of government files and 72,000 pages of the contractors' files. In September 1981, with trial estimated as at least one year away, Spacecom suggested to NASA that they try settlement again, and the parties agreed to a minitrial.

Pre-Minitrial Agreement The parties agreed that discovery would be suspended during the minitrial. Spacecom and TRW would submit a formal claim covering cost of performance and proposed allocation of cost of each legal issue, and the parties would simultaneously exchange briefs containing copies of all cited documents. There were no reply briefs. After the briefs were exchanged, each party would submit a list of questions to be answered during the minitrial.

The parties further agreed that the minitrial would last only one day, with three hours allotted to each side to present its position through any combination of lawyers and engineers that it chose. These presentations would cover only matters previously discussed in the briefs or written questions, and could not address new issues. The presentations would be made only to senior officials of each party: an associate administrator of NASA and the director of Goddard Space Flight Center for NASA, and a Vice President of TRW and the President of Spacecom, for the contractors. Only these officials could ask questions, though advisors were present for consultation.

The parties decided not to employ a neutral because they felt that the issues were so technologically complex that educating the neutral could slow down the minitrial process significantly, while a brief explanation of the technical issues could be misleading.

Finally, the settlement negotiations were limited to one day following the minitrial. If settlement was not reached, the parties would abandon the process and proceed to trial.

The Minitrial The minitrial took place in 1982. TRW and Spacecom had two and a half hours for their presentation. NASA had three hours to present its position and to respond to the presentation of the contractors. The contractors then had half an hour to respond to NASA's position. Although the minitrial agreement provided that the presentations could be made by both lawyers and engineers, only the lawyers made oral presentations. Viewgraphs were used by both sides during the presentation.

Settlement negotiations attended only by the four principal negotiators began the day after the minitrial. Lawyers and advisors were available for consultation, but did not attend the negotiating sessions. Although the parties had agreed to limit the negotiations to one day, they decided to extend the session another day since substantial progress had been made. In fact, "[a]s the negotiations actually developed, the negotiators were able to go beyond the specific issues framed by the appeals and settle other outstanding questions between the parties as a part of the overall settlement." (Legal Times 17) The final settlement was for over $100 million.

U.S. ARMY CORPS OF ENGINEERS

The Army Corps of Engineers has used minitrials more often than any other government agency. They have engaged in six to date, the first of which involved Industrial Contractors, Inc., in 1984.

Industrial Contractors, Inc. (1984)

Background In 1980, the Army Corps of Engineers entered into a contract with Industrial Contractors, Inc. for modifications to a missile silo test facility at Arnold Air Force Base in Tennessee. In November 1981, Industrial Contractors filed a claim with the contracting officer contending that the government had improperly accelerated the contract and requesting $630,000 in damages. The claim was denied by the contracting officer in July 1983 and Industrial Contractors appealed the decision to the Armed Services Board of Contract Appeals (ASBCA). In 1984, after much of the discovery had been completed, the parties agreed to suspend litigation and engage in a minitrial in an attempt to settle the case.

Pre-minitrial agreement The minitrial was to be held on December 3 and 4, 1984 at the Atlanta Office of the Corps of Engineers. The principal negotiators were South Atlantic Division Commander Brigadier General Forrest T. Gay for the Corps of Engineers, and H.W Beasley, the president of Industrial Contractors. Major John K. Northrop was the attorney for the government, while John R. Tacke served as counsel to Industrial Contractors. The neutral was now retired Claims Court Judge Louis Spector, who served *pro bono*. While the neutral advisor was not intended to be actively involved in the minitrial, only asking questions if agreed to by both parties, in fact he turned out to be an active participant in planning the minitrial and facilitating settlement. All costs were to be borne by the party incurring them and were not to be treated as legal costs in the event that the negotiations failed and the case was litigated before the ASBCA.

Although the parties were already concluding discovery, they agreed to a schedule for any remaining discovery three weeks before the minitrial and stipulated that this limited discovery would not affect later discovery in the event that the parties failed to reach a settlement. In particular, the parties recognized that they might only take partial depositions in preparation for the minitrial and provided that this would not prevent them from later deposing the same witnesses on the same or additional subject matter. At least two weeks before the minitrial, Industrial Contractors was to provide the government with an analysis of the costs associated with each issue.

The presentations were to be informal and could be structured in any manner that the parties desired. Expert witnesses, audio-visual aids, demonstrative evidence, depositions and oral argument were all allowed. Witnesses would be allowed to testify in the narrative and could be questioned by the principals. Any type of written material that would further the progress of the minitrial could be used, and the parties agreed to stipulate to as much as possible. At least two weeks before the minitrial, the parties were to exchange copies of all documentary evidence to be used and a list of all witnesses expected to appear. If they wished, the parties could also submit a position paper of no more than 25 double-spaced pages at least one week before the minitrial.

The minitrial itself was to take two days. On the first day the plaintiff would begin with a three and a half hour presentation of its position. This would be followed by one and a half hours of cross-examination by the government, then one and a half hours of plaintiff's re-examination. Finally, one hour was reserved for a question and answer period. The second day would follow a similar schedule with the parties reversed.

Negotiations were to begin within three days following the minitrial and would continue as often during the next 30 days as the parties thought useful. If no settlement had been reached by the end of the 30 day period, the negotiations would be broken off and the litigation resumed.

The pre-minitrial agreement stipulated that no transcript be made of the proceedings, and that

> "[e]xcept for discovery and several depositions undertaken in connection with this appeal, all aspects of the minitrial including, without limitation, all written material prepared specifically for utilization at the minitrial, or oral presentations made, between or among the parties and/or the advisor at the minitrial are confidential to all persons, and are unadmissible as evidence, whether or not for purposes of impeachment, in an pending or future Board of Contract action which directly or indirectly involves the parties and this matter in dispute. . . . However, . . . evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the minitrial."

Each party reserved the right to withdraw from the minitrial at any time for any reason.

The Minitrial As mentioned above, the principal for the Corps was Brigadier General Gay, Commander of the South Atlantic Division. Major Northrop, an attorney from the Corp's Mobile, Alabama District, presented the government's case. The Corps' South Atlantic Division attorney was present and available to General Gay for consultation, but did not present the case. According to Frank Carr, the Corps' Chief Trial Attorney, this was to avoid any conflict or confusion regarding the roles of presentors of the Corps' position and counsel to the principal. The participants sat around a large rectangular table with the two principals flanking the neutral on one side of the table. The attorneys sat at the ends of the table, and the witnesses sat on the remaining side.

On the first day, John Tacke, the contractor's attorney, gave a 45 minute presentation on his theory of the case. Thereafter he called the contractor's project manager, its vice-president who had prepared the bid, and a consulting CPA as witnesses who provided testimony in narrative form guided by general questions from the attorney. The rules of evidence did not apply. Mr. Tacke finished his presentation 30 minutes ahead of schedule, and later said that "he had been able in less than 3 1/2 hours of testimony to present as much information to the principal representatives and neutral advisor as would have taken him at least a week to a week and a half before a Board or Court."[210]

In the afternoon, Major John Northrop, the government's counsel, conducted cross-examination, after which the contractor's counsel, having asked a few questions on re-direct, rested his case an hour and a half earlier than scheduled in the pretrial agreement. The second day of the hearing followed the same schedule with the parties reversed. At the end of the day the principals and the neutral decided that brief summations by each side would be helpful, and the pre-minitrial schedule was altered to allow each side ten to fifteen minutes for closing argument. The presentations focused mostly on entitlement issues, though the contractor presented more evidence than the government on quantum

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[210] Letter from Stephen Lingenfelter to Lester Edelman, Dec. 13, 1984.

In addition to counsel, other advisors sat in on the minitrial, but did not take part in it or the subsequent negotiations. Technical advisors were available to the principals for consultation. In addition, a Corps auditor was present to validate any agreed upon monetary amounts. According to Carr, it has since become the Corps' practice to always involve an auditor in the proceedings.

Judge Spector, the neutral, asked questions during the presentations, but did not control the proceedings. He commented on weighing the evidence and other issues and occasionally pointed out problems with testimony. After the presentations he met with the principals. In response to a question from General Gay, Judge Spector said that he thought the contractor had a slightly stronger case, but also advised that there was substantial room for negotiation. The contractor's principal then made an offer of $456,000, which General Gay took to his staff. Since the government's presentation had dealt almost exclusively with entitlement, while the contractor's attorney had also presented quantum, General Gay suggested that the Division technical staff meet with the contractor to go over the claimed costs in detail.

The next day the contractor's project manager, the DCAA auditor, the South Atlantic Division auditor and a technical advisor from the Construction Division met for almost six hours to substantiate the contractor's claims. That afternoon General Gay and Mr. Beasley reconvened and agreed to a $380,000 settlement.

Tenn-Tom Constructors, Inc. (1985)

The Army Corps of Engineers' second minitrial involved a contract for the excavation of 11 miles of the Tennessee-Tombigbee waterway. The contract was awarded in 1979 to Tenn-Tom Constructors, a joint venture involving Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. The award was based on soil conditions found by the Corps in testing prior to solicitation of the contract. When Tenn-Tom discovered different soil conditions, they submitted a $42.8 million claim for equitable adjustment. The claim was denied by the contracting officer in August 1984, and Tenn-Tom appealed to the Army Corps of Engineers Board of Contract Appeals in October 1984.

In April 1985, the parties agreed to a minitrial which was held on June 12 - 14, and 27 - 28, 1985. The Corps had been publicizing its new ADR approach, and Tenn-Tom's counsel approached the Corps with the suggestion that they try a minitrial. The claim, by then amounting to $55.6 million including interest, was settled for $17.2 million.

The principals at the minitrial were Ohio River Division Engineer Brigadier General Peter Offringa for the Corps and J.K. Lemley, Senior Vice President for Morrison-Knudsen for the contractors. General Offringa had never had a contracting assignment before, but is trained as a civil engineer. The government's case was presented by Wes Jockisch, Division counsel for the Ohio River Division, while the contractor was represented by George Ruttinger and Stanfield Johnson of Crowell & Moring. The parties exchanged lists of eight or nine possible neutrals, but had trouble agreeing on one because each felt that the other's proposed neutral was biased in some way. They finally agreed on Professor Ralph Nash, a law professor at George Washington University, as the neutral.

At the time the parties agreed to the minitrial, the parties had filed, but not responded to initial discovery requests. Judge Solibakke granted a three month delay for the minitrial, but also put together a fall-back calendar for full discovery, hearings and monthly conferences. Trial was expected in the Spring of 1986, almost a year away. The parties agreed to grant access to project files in preparation, but otherwise agreed that there would be no pre-minitrial formal discovery.

Two weeks before the minitrial, the parties exchanged copies of all documentary evidence to be presented at the hearing, a list of all witnesses and position papers which were limited to 50 double spaced pages. The Corps used the contracting officer's final decision as its position paper. Four weeks before the hearing, the Corps submitted an audit report, and two weeks later the contractor gave the Corps a quantum analysis identifying the costs associated with the issues involved at the hearing.

The parties presented their cases on June 12 and 13, while June 14 was reserved for evidence on quantum and for remaining questions. On the first day Tenn-Tom was allotted five hours for its presentation, after which the Corps had 30 minutes for cross-examination followed by 30 minutes of redirect. Thereafter two hours were set aside for questions from the principals. The next day the Corps had four and a half hours for its presentation, followed by 30 minutes each for cross and redirect examinations. The principals then had an hour and a half for questions, after which each side had 30 minutes for closing argument. On the third day each side had an hour and a half for their quantum presentations, followed once again by an hour of questions from the principals.

Both sides used slides, video tapes and witnesses to present their cases. These methods appeared to be very effective. Mr. Johnson, counsel for Tenn-Tom, noted afterward that they probably would not have been able to get the slides and videos entered as evidence in a formal BCA hearing, though Mr. Jockisch disagreed. The witnesses gave some testimony in narrative form. The parties agreed that the rules of evidence would not apply. Both parties felt that this allowed more information to be presented in a much shorter time than would be the case in a formal BCA hearing. Each side also had an expert witness whom the principals and neutral asked to stand side by side and respond to each other in an informal colloquy. Cross-examination was allowed only after the other side had completed its presentation. No transcript was made of the proceeding, and the minitrial was completely confidential. If the parties settled, however, all information prepared for and presented at the proceeding could be used to justify and document the settlement modification.

The principals asked many questions during the minitrial, mostly on factual issues. Originally, Mr. Nash's role was simply to enforce the time limitations imposed by the pre-minitrial agreement, but not to actively participate in the proceedings unless permitted by the principals. As it turned out, the parties did ask him to participate fully in both the hearing, including questioning of witnesses, and the subsequent settlement negotiations. He also served as a mediator during the negotiations, suggesting middle grounds that might lead to settlement and proposing various methods of computing the amount of the price adjustment to which the contractor might be entitled. The principals had advisors, including legal counsel, technical people, consultants and auditors, available at all times during both the minitrial and the negotiations. Mr. Jockisch served as both trial attorney and counsel to General Offringa.

The pre-minitrial agreement provided that the principals would meet immediately after the hearing to negotiate a settlement; if they could not reach agreement within 15 days, litigation would resume. After meeting for several hours after the hearing, however, the principals decided that they needed more evidence on certain additional subjects and agreed to reconvene the hearing on June 27. They settled on June 28, 1985 for $17.2 million. According to George Ruttinger, counsel for Tenn-Tom, the settlement represented a substantial compromise by both sides from their initial positions in the litigation.

Soon after the settlement, a disgruntled regional staffer accused the Corps of incompetence, claiming that the case was too complex to settle in just a few days. This prompted a Department of Defense Inspector General's investigation into the minitrial. The Inspector General's report concluded that the Tenn-Tom claim was reasonably settled in the best interest of the Government but advised the Corps to better document its procedures.

Saudi Building Technic General Contracting Co, Ltd./Erectors, Inc. (December 1986)[211]

In a procedure similar to the minitrial, the Middle East/Africa Projects Office successfully used ADR to settle $105 million in claims arising out of the construction at the King Khalid Military City, Saudi Arabia. After a week long negotiating session that included presentations by the attorneys and claims consultants to each party and representatives for the Saudi Arabian and Philippine Governments, the parties settled the claims for $7 million.

W.G. Construction Corp. (January 26 and 27, 1987)

This minitrial involved a claim for equitable adjustment of a contract for the construction of the Administration Building, Visitors Center, and Maintenance Complex at the Morris Hill Recreation Area at Gathright Lake, Virginia. W.G. Construction Corporation, the contractor, asserted a $764,783 delay and impact claim, alleging that deficiencies in certain drawings and plans and rock unexpectedly encountered during excavation caused delay and additional costs. The claim was denied by the contracting officer on October 11, 1983, and W.G. Construction appealed the decision to the Engineers Board. On December 24, 1986, the parties agreed to a minitrial to be held on January 26 and 27, 1987, the scheduled trial date.

The minitrial was proposed by the Division counsel, who had been looking for appeals that would be good candidates for minitrials. They identified the W.G. Construction case as a good possibility and suggested it to the District counsel who readily agreed. The District counsel made the proposal to the contractor who also agreed. The Corps first asked the Division Engineer to be the government's principal. When he declined, they turned to Col. Claude D. Boyd, the then current contracting officer. The contracting officer who had actually denied the claim was no longer serving in the District at the time of the minitrial. The contractor was represented by Mr. R.C. Doyle, who had been overseeing some of the administrative aspects of the contract. Both had full authority to settle the dispute. Counsel for the contractor declined to employ a neutral, saying that they did not want to take the time to find a neutral and work out the details.

Discovery was to be finished two weeks before the beginning of the minitrial, which meant that the parties only had about two weeks to conduct their abbreviated discovery. The pre-minitrial agreement stipulated that ten days before the minitrial the contractor would submit a quantum analysis to the Corps, and a week before the hearing the parties would exchange copies of all documentary evidence and witness lists. If they wished, the parties could exchange position papers of no more than 25 pages at least a week before the hearing.

The parties were to present their cases to the two principals in two days. During the first day, the contractor was to present its case in four hours after which each side had an hour and a half for cross and redirect examination. This was to be followed by a two hour presentation by the Corps. The next day the Corps was to continue its presentation for another two hours, followed once again by cross and redirect. Each side then had a half hour for closing argument, after which the two principals were to meet for negotiations for three hours. Evidence could be presented through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. No transcript was to be made of the proceedings, and either party could withdraw at any time for any reason.

As it turned out, the parties adhered closely to the total allotted time for their presentations, but did not follow the order outlined in the agreement. For instance, the government did not conduct a cross-examination, but instead annexed that hour and a half to its presentation time. The parties used both documentary evidence and lay witnesses, but neither side used experts. Bob Oswald, the Corps' attorney, used approximately 20% of his allotted time for his own oral presentation of his case, while the remainder of his time was used for witness testimony. He generally directed his witnesses, but they essentially testified in narrative form. The contractor's attorney, on the other hand, used most of his time for oral argument, relying largely on documentary evidence without much testimony from witnesses. Those witnesses he called testified in question-and-answer, rather than narrative, form.

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[211] Six Corps minitrials are summarized in a memorandum dated March 30, 1987; *ADR Sourcebook*, 587.

The principals did ask some questions, but not as many as one of the attorneys expected. Mr. Doyle was advised during the minitrial hearing and negotiations by his trial attorney. Mr. Oswald played the dual role of trial attorney and counsel, and Colonel Boyd consulted with his District counsel as well. An auditor was available to Colonel Boyd throughout the procedure, but neither testified nor was consulted. During the negotiations, which lasted about a week, the principals frequently consulted with their attorneys on possible settlement amounts.

After the claim was settled on February 10, 1987, for $288,000, the Corps attorney wrote a justification memo for the settlement. At the time the Corps did not have the money to pay the settlement and had to go to Congress for additional appropriations. The justification memo was included in the package requesting the appropriations. The Corps received the settlement money from Congress the week of July 13, 1987.

Walter T. Dickerson (February 18, 19 and 20, 1987)

This, the Corps' fifth minitrial, concerned a contract for the modification and repair of Tainter Gates at Greenup Locks and Dam on the Ohio River. The claim for $515,123, consisting of nine appeals to the Engineer Board, involved such issues as differing site conditions, weather related delays, impact costs and inadequate bookkeeping. The parties settled after a two and a half day minitrial for $155,000, including interest.

The Corps' principal was Colonel[212] Ernest J. Harrell, the Ohio River Division Engineer, who was given contracting officer authority for this case. The contractor was represented by Mr. Terry Isenman, its vice president and co-owner. The parties interviewed a number of people before they settled on Frederick Lees, former Chairman of the NASA Board and currently a professor at George Washington Law School as the neutral. The Corps and the contractor discussed whether they wanted someone with a technical or legal background and decided that it did not matter as long as the neutral had a background in government contracts. They chose Professor Lees because he is an expert in government contracts and a retired BCA judge.

The idea of using a minitrial in this case came from the contractor who contacted the Corps after having read an article about minitrials. The parties agreed to a minitrial in October of 1986 when the case was docketed and preparation of interrogatories had begun. They scheduled the minitrial for April, which left approximately 60 days for discovery including depositions, informal discussions, and document examination. Before the hearing, the parties submitted informational position papers rather than formal legal briefs. They also exchanged witness and exhibit lists informally by letter.

The minitrial took about two and a half days. Each side's presentation took four and one half hours and employed exhibits and narrative witnesses. The trial attorneys also conducted limited cross-examinations. The hearing was informal to the extent that contrary to the parties' intentions, one witness felt free to jump in at any time with comments and remarks.

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[212] Colonel Harrell has since been promoted to General.

The neutral's role was determined by the principals, who at first wanted him to hold back. Once they got to know him, however, they allowed him to ask questions, and in fact let him talk often. The principals also asked frequent questions and were constantly talking and negotiating with each other throughout the hearing. The formal post-hearing negotiations took about half a day.

The parties drew up a very brief settlement document stating the amount settled for and the time when the check would be handed over. They had documented the whole proceeding very carefully as they went along, however, and therefore were not concerned about a possible Inspector General's investigation of the Tenn-Tom sort.

Granite Construction Co. (March 19 and 20, 1987)

The ADR procedure used in this case was a combination of a minitrial and non-binding technical arbitration. After the Corps' experience with the Tenn-Tom minitrial and the subsequent discontent among some staffers, the South Atlantic Division was reluctant to engage in another minitrial and chose this hybrid instead.

Granite Construction Company, the prime contractor, had subcontracted with R & S Haulers, Inc. to provide sand for a mass concrete placement for the Aberdeen Lock and Dam on the Tennessee-Tombigbee Waterway. During construction, the government condemned the site upon which R & S's plant was located, forcing the subcontractor to move and causing delays in the production of sand. The government had already recognized entitlement, but the parties were at odds over the amount. The claim presented to the neutral advisor was for over $1.9 million.

The pre-minitrial ageement stipulated that the parties select a neutral advisor, specifically not a lawyer, with a strong background in mass concrete construction. They were to submit all proposed exhibits to him and each other at least seven days before the hearing. After considering one other possible neutral, they chose Mr. Chris Woods, a semi-retired executive with the Al Johnson Construction Company who had extensive experience with concrete work and had particiated in work done by his company on the Tennessee-Tombigbee Waterway. The principals were Colonel C. Hilton Dunn, the contracting officer for the Corps, and Richard H. Roberts, the Executive Vice President of Granite. Both had authority to settle the claim.

On March 19 and 20, 1987, technical advisors from each party presented their case to Mr. Woods. The principals were not present. Granite's chief spokesman was Mr. Dick Lewis, an engineer, who was supported by four other technical people. The Corps' case was presented by a team of four engineers and technical advisors. The Corps' team had been extensively briefed on the case by counsel before the hearing, and they frequently consulted with counsel during breaks in the proceedings. By agreement no attorneys were present at the hearing, but they were available by telephone for consultation. The neutral advisor could ask questions at any time during the hearing, and the parties could submit written questions of the other side to the neutral, though he was not obligated to ask the questions. There was no cross-examination of witnesses. Each presentation took approximately half a day, and the second day was used for rebuttal. The proceeding was not transcribed.

In accordance with the pre-minitrial agreement, Mr. Woods prepared his findings within ten days, recommending that the parties settle for $725,630. According to the pre-minitrial agreement, this decision "[setting] forth the amounts which he ... [had] allowed for the various portions of the claim and the general methods used to determine said amounts," (Agreement, 2) was non-binding and was "only intended as a guide to the parties for the final resolution." He presented his findings to the two principals, Colonel Dunn and Mr. Roberts, in a meeting on April 9, 1987. After the oral presentation, the principals read Mr. Woods' report and negotiated for approximately four hours. While both parties agreed that the advisor had a logical and reasonable basis for his findings, they disagreed with certain parts of the report. They wanted to avoid an item-by-item negotiation however, fearing that such an approach would lead to adversarial positioning. After consulting with their respective staffs, the principals settled for the recommended amount. The only question remaining was how to calculate interest on the settled sum.

The fees and expenses of the neutral advisor were split evenly between the parties, while each side bore its own cost.

DEPARTMENT OF THE NAVY

McDonnell-Douglas Corporation (1986)

The Navy held two experimental minitrials involving three disputes during the summer of 1986. While the parties have released no details of the minitrials, some information is available.

The first minitrial involved two disputes with McDonnell-Douglas Corporation and concerned mixed audit and legal issues. The principal for the Navy was a Rear Admiral who was advised by non-litigation in-house counsel, and the neutral in both cases was Professor Ralph Nash of George Washington University. The parties combined two disputes into one minitrial, stipulating that they could and would not settle one without settling the other. The first case was two years old, and discovery had already been conducted for six months (54 depositions had been taken). The second dispute was new, and no discovery had yet been conducted at the time of the minitrial agreement.

While preparation for the minitrial took about three months, the hearing took two and a half days (each side had four and one half hours per case), plus half a day for negotiations. The parties agreed before the proceeding that either side could designate any evidence they wished as confidential without objection by the other side. As a result, the only people present throughout the hearing were the two principals, the neutral, and the two attorneys. Three expert witnesses were called to testify, but were sequestered and did not know the facts of the case. DCAA auditors were not allowed in the room, but had to be consulted during breaks in the hearing.

The settlement negotiations took only a few hours. The parties agreed to the Navy's position in one case, and the other was evenly split. Together the cases settled for a total of $6.5 million.

Other Navy Minitrials

The second minitrial did not reach settlement, but did significantly narrow the issues. This minitrial involved an overhead cost allocation suit. The parties decided not to engage a neutral, and the process from the time the parties agreed to a minitrial to the time they broke off negotiations took thirty-one days.

The Navy is currently engaged in a minitrial in Seattle, Washington, involving a $75,000 claim. This minitrial seeks to resolve a dispute before the contracting officer makes a final determination. The principal for the Navy is the contracting officer, while the neutral is a local attorney.

The Navy is currently considering three other cases for minitrial.

DEPARTMENT OF ENERGY

Boecon Corporation (1986)

The Department of Energy (DOE) held its first minitrial in the summer of 1986. The DOE had contracted with Catalytic, Inc. to build additions to a chemical storage facility in Idaho Falls. Catalytic in turn subcontracted with Boecon, a subsidiary of Boeing, which in 1984 claimed damages for "loss of productivity from numerous disruptions and delays due to government changes in the project."[213] The government and the prime contractor counterclaimed for negligent performance.

After a year of discovery, during which the DOE's Board of Contract Appeals repeatedly and unsuccessfully tried to convince the parties to settle, the case finally went to trial. The six-week hearing produced a record consisting of eight or nine volumes and eleven boxes of exhibits. (1 ADR report 45) As Judge Carlos Garza began to write his opinion, he convinced the Board to authorize a minitrial to help the parties settle. Judge Garza held several telephone conferences with the parties and the Board. A minitrial agreement was finally reached and its terms were set out in Judge Garza's order of April 30, 1986.

Pre-Minitrial Agreement Each party was to appoint a very high-level representative not previously involved with the appeal, who had full authority to settle the dispute. Each representative was to be accompanied by an attorney. The parties and the Board would together decide upon a neutral who would serve both as the presiding officer at the minitrial and as advisor to the two high-level principals. The costs of the neutral would be borne sixty percent by the government and Catalytic, and forty percent by Boecon. Either party could withdraw from the procedure at any time without reason, but if a party were to withdraw before the neutral had formally decided that the minitrial could not be successful, that party would bear all costs of the minitrial.

At the minitrial each side would have a strictly enforced time limit in which to present its arguments. In addition, if the parties wished, the Board would present on the record or through counsel agreements a short summary of the case, undisputed facts and fact stipulations, as well as admissions of fact. The transcript of the earlier Board hearing and documents admitted into evidence would be available for reference during the negotiations.

The Board's only participation in the minitrial would be to present its summary if requested and then immediately leave the hearing. The attorneys were to leave at the conclusion of the hearing. The negotiations were to involve only the two principals and the neutral. The Board and attorneys would, however, be available for questions.

Finally, the parties agreed that, "[s]hould they be successful, this [would] end all litigation, of every type and nature whatsoever, involved in this case." If the minitrial did not succeed, Judge Garza would issue the Board opinion he was in the process of writing.

The Minitrial William R. Voigt, Jr., a nuclear physicist and Director of the Office of Remedial Action and Waste Technology, was chosen as the principal for the government and Catalytic Inc. He had previous experience in contract disputes, but his experience was limited so that he had to spend approximately 60 to 70 hours over a two week period preparing for the minitrial. In a memo signed by the Director of Procurement, the manager of the Idaho Operations Office, and the Undersecretary of Energy, Mr Voigt received full authority to exercise his independent judgment in settling the dispute without further need for approval from the government. Boecon, a subsidiary of Boeing, chose William N. Allbrecht, Boeing's Vice President for Governmental Contracts as its representative. The parties agreed upon Donald P. Arnavas, a former ASBCA judge now in private practice, as the neutral.

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[213] 1 BNA ADR Rep. 45, May 13, 1987.

Each party was given two hours to present its case, which was sufficient, according to Mr. Voigt. The only real issue was how much the government owed Boecon in damages. An interesting aspect of the process was the contractor's use of a comparison of government witnesses' deposition and hearing testimony to point out basic inconsistencies weakening the government's litigating positions.

During the subsequent negotiations, Mr. Arnavas acted as a referee, explaining legalities and steering the principals in the right direction. He also advised the principals on factual and legal issues and gave his opinion of the reasonableness of particular offers. He did not, however, tell them how he would decide the case, nor did he advise any party to accept a particular offer. Mr. Arnavas was present during the negotiations, though at one point the parties did ask him to leave for a while. Voigt says that he did not rely too much on the neutral or the attorneys for legal advice, having already been briefed by both the Energy Department's trial attorneys and the General Counsel and having sought out advice from a variey of people, including the government project manager, before the minitrial.

After one and a half days of negotiation, the parties agreed on a $5,061,871 settlement which "essentially equalled [Boecon's] original claim without interest."[214] The "complete settlement" was signed on July 24, 1986 and was approved by the Board three months later. There was no further documentation of the minitrial. According to Judge Garza, the Board would have rejected any settlement found not to be fair and equitable. Since he had already written approximately half of his decision in the case, Judge Garza was in a good position to determine the fairness of the settlement. The Department of Energy accepted the settlement without review or investigation.

One problem did arise over a second unsettled contract which the government thought to be included in the pre-minitrial agreement clause providing that all litigation involved in the case would be ended by a final agreement. Boecon disagrees that this unsettled contract is covered by the pre-trial agreement, and as a result, the parties are now negotiating a settlement without a neutral.

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[214] 1 ADR Rep. 46.

APPENDIX C

SUMMARY OF AGENCY MINITRIAL POLICIES

A. Summary of Army Corps of Engineers Minitrial Policy, issued in EC 27-1-3, 23 Sept. 1985

Case Selection When the Division Engineer receives the contract appeal file, the Division Counsel reviews the case for suitability for minitrial. The Division Engineer has the authority to select cases for minitrial. The policy states that though "most contract appeals are suitable for minitrials, appeals involving clear legal precedent or having significant precedential value are not appropriate." Once the Division Engineer determines that the case is appropriate for minitrial, Division Counsel notifies the appellant and gives him the chance to participate.

Representatives The government's principal who has the authority to resolve the claim must be the Division Engineer or in particular circumstances the Deputy Division Engineer. The contractor's principal should be a senior management official who has not previously been involved with the dispute and who has settlement authority. Each party must also have a representative to present the case. For the government, this representative is the trial attorney.

Neutrals If the parties choose, they may engage a neutral advisor with experience in government contracting and litigation. This neutral is to be chosen from a list maintained by the Chief Trial Attorney, and his costs are to be shared equally by the parties. The role of the neutral advisor is to be determined by the parties in the minitrial agreement. His duties may include, but are not limited to, enforcing the agreement and giving his opinion on the merits of the claim. The neutral may not be called as a witness in any later litigation.

Minitrial Agreement A minitrial agreement is mandatory and is to be negotiated by the Division Council in conjunction with the government trial attorney. The agreement must contain a specific time limit for the minitrial, but beyond that requirement there are no rules for the agreement. Each agreement should reflect the needs of the particular case. Once an agreement is reached the BCA proceedings are suspended for the duration of the minitrial.

Minitrial Process The policy states that "(t)he minitrial process is flexible and as such the procedure should reflect the needs of the parties considering the time and costs involved." The time for the minitrial, however, should be limited and strictly adhered to. In addition, the scope of discovery should be limited, and discovery itself should be finished two weeks before the start of the minitrial. All minitrial discovery is on the record.

After discovery and before the minitrial, the parties should exchange "written submittals" such as position papers and exhibit and witness lists. Appellant should also submit a quantum analysis.

The minitrial hearing should not take more than two days. The parties can choose how best to present their cases and may use "expert witnesses, audio visuals, demonstrative evidence and oral argument." All testimony will be unsworn, and no transcript will be made. Closing arguments should be made since there are no post-hearing briefs. Either principal may terminate the minitrial at any time.

Negotiations The principals should meet for negotiations immediately following the minitrial. The meeting should be private, though the agreement may allow the neutral to be consulted. Staff members may also be consulted. All discussions in the negotiation are confidential and may not be used as evidence in later litigation.

B. Summary of Department of the Navy Alternative Disputes Resolution Test Program, outlined in Memorandum from the Secretary of the Navy, 23 December 1986

According to the Navy's policy, "[w]hile the minitrial will be the basic technique most commonly used in resolving contract disputes outside the traditional litigation context, [it] does not necessarily limit other approaches. Further, while it is the linchpin of a structured settlement process, imaginative adjustments to the litigation process at the ASBCA could also be a valuable tool for the parties to resolve disputes at a substantial savings of time and dollars." Among these other methods are summary binding and non-binding ASBCA procedures.

Case Selection The program applies to all Navy contract appeals before the ASBCA. According to the program outline, "(t)he decision to proceed with ADR is a business decision, which must take into account relevant legal considerations." The best kinds of cases for ADR are those involving only factual disputes, while the worst are those involving disputed law applied to undisputed facts. The amount in dispute and the fact that a case involves legal issues are not determinative of whether a case is suitable to minitrial. The only kinds of cases where ADR should not be used are 1) those involving clear legal precedent where compromise is difficult and 2) those that may create important precedent themselves. The responsibility for indentifying cases for ADR lies with both the Navy trial counsel in charge of reviewing on-going litigation and with the Navy officials involved with the contract.

Representatives The Navy's principal should have contracting officer authority sufficient for the amount in dispute, and neither principal should have been involved in preparing or denying the claim. Where necessary, the minitrial agreement should allow the presence and participation of in-house non-litigation counsel for each party. Since a legal memorandum must be written to support any settlement, the Navy principal must be allowed to consult with his in-house non-litigation counsel before a final agreement.

Neutrals A minitrial agreement may, but is not required to, call for the use of a neutral advisor who is experienced in government contract law and preferably in litigation. In smaller, less complex cases, a neutral will not normally be necessary. The role of the neutral is not set out in the Navy policy, but should rather be laid out in the minitrial agreement. The Navy's sample agreement however, states that "[t]he neutral advisor shall preside or serve as moderator at the minitrial hearing. The neutral advisor may ask questions to seek clarification, but may not direct, limit or otherwise interfere with either representative's presentation or rebuttal, surrebuttal, or closing argument." The sample agreement further states that the parties may jointly and by agreement seek the advice of the neutral on procedural and administrative matters.

In choosing a neutral, the parties should agree on a list of ASBCA judges acceptable to both. The General Counsel then submits the minitrial schedule and a request that one of the judges on that list be assigned to the minitrial to the Chairman of the ASBCA. If this fails, the neutral advisor may be chosen from the private sector, providing that he is not currently representing the contractor in a dispute against the Navy. The policy states that sources of private sector neutral advisors include retired Trial Commissioners of the U.S. Claims Court, retired Judges of the Claims Court and present or retired members of law school faculties.

Minitrial Process Each minitrial has three stages -- pre-hearing, hearing, and post-hearing. The pre-hearing stage covers the time from when the parties draw up a minitrial agreement to the hearing itself. This period is used for whatever activities the agreement permits, including for instance, discovery and exchange of position papers.

The hearing stage should usually take between one and three days. The representatives of the parties, usually the trial attorneys, are allotted a specific amount of time in which to present their cases to the principals in whatever way they choose. The post-hearing negotiations should be limited by the minitrial agreement, and the parties should agree to resume litigation if they are unable to settle in that time. All proceedings are confidential and are not to be used in later litigation.

C. Summary of Policy Statement on Minitrials, Dept. of Justice, Commercial Litigation Branch, circulated June 19, 1986

Case Selection A minitrial should not be used for cases which are likely to be governed by clear precedent, are expected to establish important legal precedent or are clearly without merit. Cases involving factual disputes which do not depend upon the credibility of witnesses are preferred.

If the contractor proposes a minitrial, the Department's trial attorney should submit the request and a recommendation to his supervisor. If the Department's attorney thinks that a case is suitable for minitrial, he must get the recommendations of the interested agency, obtain approval from his supervisor and then propose the procedure to the contractor. "The decision to participate in a minitrial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department."

Representatives The government's principal will be the DOJ official with settlement authority or, if necessary, the official with authority to recommend settlement. The contractor's principal must be a high level official with settlement authority who preferably has not previously been involved in the case. Each party will have a representative to present the case; for the government this will be the attorney of record.

Neutrals The parties may designate a neutral third party to advise the principals on any issue upon which the parties agree in advance. "The neutral ... should be a person with either legal or substantive knowledge in a relevant field," and cannot be involved in any further litigation after the minitrial. The amount and manner of compensation for the neutral must also be agreed upon by the parties in advance.

Minitrial Agreement The minitrial agreement is to be negotiated by the representatives of the parties with the approval of the principals. The agreement should be tailored to each particular case, but must contain time limitations for each aspect of the procedure, a statement on the non-binding nature of the minitrial and an agreement to suspend litigation during the minitrial.

Minitrial Process The policy does not require any specific procedures, but lists those that are generally appropriate. Time limitations are to be specifically stated and strictly enforced. The scope and amount of discovery should be limited and completed at least two weeks before the minitrial. A nongovernment party may not conduct discovery under the minitrial agreement if it has a FOIA request pending. Before the minitrial, the parties should exchange written submittals and lists of exhibits and witnesses. The contractor must also include a quantum analysis. If the minitrial does not take place at a government facility, the government will not pay any part of the fee charged for the facility.

The presentation of the case to the principals should normally take only one day. Each representative may, within his alotted time, present his case in any manner he wishes, including through witnesses, demonstrative evidence and oral argument. The principals will be able to examine any witness. No transcript of the proceedings will be made.

Negotiations The settlement negotiations will take place immediately after the minitrial and will be private, although the minitrial agreement may allow each principal to have a technical advisor present. This technical advisor may not be the party's representative. Though the principal's attorneys may not be present at the negotiations, he may consult with them whenever he wishes. "The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation."

Finally, any party may withdraw from the minitrial at any time.[215]

D. Summary of U.S. Claims Court General Order No. 13, April 15, 1987

Case Selection Claims Court General Order No. 13 encourages parties to employ either settlement judges or minitrials to help resolve disputes and states that these methods are particularly appropriate where the parties anticipate a lengthy discovery period followed by a protracted trial and where the amount in controversy is greater than $100,000. Minitrials should only be employed in cases involving factual disputes and well-established principles of law.

When both parties agree to employ one of the two ADR methods, they should notify the presiding judge who will then decide whether to refer the case to ADR. If the judge agrees that the dispute is suitable for ADR, the case is assigned to another Claims Court judge who will preside over the ADR procedure chosen. The ADR judge will exercise ultimate authority over the form and function of each method within the general guidelines adopted by the court.

Representatives Each party should be represented by an individual with settlement authority and may be represented by counsel. The participation of senior management/agency officials with first-hand knowledge of the underlying dispute is highly recommended.

Minitrial Process Discovery should be expedited, limited in scope, and should conclude at least two weeks prior to the hearing. At the close of discovery the parties should exchange brief written submittals, witness lists and exhibits. The parties should also establish final procedures for the hearing at a pre-hearing conference with the minitrial judge.

The hearing itself should take no more than one day. The parties may present their case through examination of witnesses, demonstrative evidence and oral argument. The rules of evidence and procedure do not apply, so objections will not be permitted and no transcript will be made. The role of the minitrial judge is flexible and may provide for active questioning of witnesses.

Negotiations At the conclusion of the hearing the principals and/or counsel will meet to discuss resolution of the dispute. The minitrial judge may play an active role in the discussions or merely be available to render an advisory opinion concerning the merits of the claim.

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[215] The DOJ policy applies to all cases in the Commercial Litigation Branch, not just to contract cases. However, since this is a study of contract disputes, the language in this summary focuses on contracts.

APPENDIX D

PERSONS INTERVIEWED FOR THE STUDY

We would like to acknowledge gratefully the invaluable assistance of the following interviewees:

Donald P. Arnavas, Pierson, Ball, & Dowd

Daniel M. Arons, Vice Chairman, Armed Services Board of Contract Appeals

Robert P. Bedell, Administrator, Office of Federal Procurement Policy

Richard K. Berg, Multinational Legal Services, P.C.

Gene Perry Bond, Perkins Coie

Frank Carr, Chief Trial Attorney, U. S. Army Corps of Engineers

John J. Corcoran, Chairman, Veterans Administration Board of Contract Appeals

C. Stanley Dees, McKenna, Conner & Cuneo

Carroll C. Dicus, Jr., Chairman, NASA Board of Contract Appeals

David Doane, Administrative Judge, Interior Board of Contract Appeals

Rollee H. Efros, Associate General Counsel, General Accounting Office

Carlos R. Garza, Administrative Judge (ret.), Department of Energy Board of Contract Appeals

Forrest Gay, Brig. General (ret.), U.S. Army Corps of Engineers

David Glendinning, Office of the Inspector General, Department of Defense

Wesley C. Jockisch, Division Counsel, U. S. Army Corps of Engineers

Paul Killian, Watt, Tieder, Killian, Toole, & Hoffar

Vincent A. LaBella, Administrative Judge, General Services Administration Board of Contract Appeals

Stephen I. Lingenfelter, Division Counsel, U.S. Army Corps of Engineers

Russell C. Lynch, Chairman, Interior Board of Contract Appeals

Lawrence S. Margolis, Judge, U.S. Claims Court

Kirk B. Moberly, Jr., Defense Contract Audit Agency, Department of Defense

Marvin H. Morse, Administrative Law Judge, Department of Justice

Sara Najjar, Assistant General Counsel, NASA

Ralph C. Nash, George Washington University School of Law

Robert Oswald, District Counsel, U. S. Army Corps of Engineers

Reba Page, U.S. Army Corps of Engineers

George D. Ruttinger, Crowell & Moring

William J. Sharkey, Assistant Director for Policy and Plans, Defense Contract Audit Agency, Department of Defense

Emanuel P. Snyder, Chairman (ret.), Department of Transportation Board of Contract Appeals

Richard C. Solibakke, Chairman, U. S. Army Corps of Engineers Board of Contract Appeals

Eleanor R. Spector, Deputy Assistant Secretary of Defense for Procurement

Louis Spector, Chairman (ret.), Armed Services Board of Contract Appeals, and Senior Judge (ret.), U.S. Claims Court

Leonard J. Suchanek, Chairman, General Services Administration Board of Contract Appeals

Dennis Trosch, Assistant General Counsel for Logistics, Department of Defense

C. John Turnquist, Associate General Counsel for Litigation, Department of the Navy

Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense

William R. Voigt, Jr., Director, Office of Remedial Action and Waste Technology, Department of Energy

Paul Williams, Chairman, Armed Services Board of Contract Appeals

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-12

ADJUDICATION PRACTICES AND PROCEDURES OF THE FEDERAL BANK REGULATORY AGENCIES

by

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December 1987

ADJUDICATION PRACTICES AND PROCEDURES OF THE FEDERAL BANK REGULATORY AGENCIES

Michael P. Malloy

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I. INTRODUCTION

This study is intended to examine certain formal enforcement practices and procedures of the federal regulators of depository institutions.[1] In particular, the focus is the APA hearing practices and procedures of the federal regulators in the enforcement context. Ironically, the first feature that one identifies in this regard is that there are few hearings ever conducted, whether judged in terms of absolute numbers of hearings, or even relative to the number of enforcement actions undertaken by these regulators.

The second prominent feature of this enforcement context is a natural result of the first. Regulatory enforcement appears to proceed to a significant extent in shadowy, informal ways, outside of public view and, for the most part, without judicial review.

This second feature has important practical consequences for those relatively few enforcement actions which actually do proceed to an APA hearing or judicial review. These consequences are evident from the third prominent feature of these regulatory enforcement actions: publicly available data about the legal and policy principles at work in the enforcement actions of these regulatory agencies are limited, and the body of case law is small. For those outside these agencies -- including administrative law judges ("ALJs"),[2] trial and appellate judges, and certainly affected depository institutions -- the enforcement practices and policies applied by the agencies almost seem to require a leap of faith.

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[1] In this context, the term "depository institution" is used to refer to commercial banks, savings banks and savings and loan associations, and credit unions. On the general meaning of the term, see 1 M. P. Malloy, *The Corporate Law of Banks* 5-8 (1988). *See also* 12 U.S.C. § 461(b)(1)(A) (statutory definition of "depository institution").

[2] The regulatory agencies involved (*see* text and accompanying notes 18-46, *infra*) generally do not carry ALJs. *Cf.* 5 U.S.C. § 3105 (appointment of ALJs as necessary for APA proceedings). Hence, in those situations where an administrative hearing is required, an ALJ must be detailed from some other federal agency. *See id.* § 3344 (details of ALJs). *Cf.* *Federal Home Loan Bank Board* v. *Long Beach Federal Sav. and Loan*

In order to analyze and assess the adjudication practices and procedures of these agencies, from a properly informed perspective, this study will review the statutory authorities available to the agencies primarily with respect to enforcement of federal "banking"[3] laws.[4] Because these authorities are applied almost exclusively within the administrative setting, the study then analyzes the implementing regulations of each agency with respect to enforcement practices and APA hearings[5]

Since so few of these enforcement actions reach a public forum, particular attention will be given to what little is available by way of judicial interpretation of these statutory authorities.[6] In this context, the discussion will include both consideration of the applicable standard of judicial review of administrative enforcement actions[7] and an analysis of judicial

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Ass'n, 295 F.2d 403 (9th Cir. 1961) ("hearing examiner" (now ALJ) not validly appointed). Not surprisingly, the end result has been that ALJs are expected to give a high degree of deference to the recommendations of agency examiners. See Sunshine State Bank v. Federal Deposit Ins. Corp., 783 F.2d 1580 (11th Cir. 1986).

[3] The unfortunate, and potentially misleading, use of the term "banking" in this regard may be unavoidable given customary usage. What is intended, of course, within the scope of this study, is the the body of federal laws concerning the regulation of depository institutions generally. Cf. note 1, supra.

[4] See text and accompanying notes 83-195, infra.

[5] See text and accompanying notes 196-290, infra.

[6] See generally text and accompanying notes 291-475, infra.

[7] See text and accompanying notes 296-338, infra.

interpretations with respect to specific problem areas.[8] In addition, to the extent possible, working from the meagre range of publicly available data,[9] the study also reviews and analyzes the practical experience of the agencies in utilizing their statutory enforcement authority.[10]

The study concludes with an evaluation of the effectiveness, efficiency and accessibility of agency enforcement adjudication practices and procedures.[11] Based upon all of the foregoing, the study formulates recommendations for the improvement of these practices and procedures and related aspects of the hearings process.

A. Nature of the Inquiry

A noted commentator once characterized the regulation of national banks as being

> more intensive than the regulation of any other industry, for it extends to all major steps in the establishment and development of a national bank, including not only entry into business, changes in

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[8] See text and accompanying notes 339-475, infra.

[9] The regulatory agencies have tended not to be very informative about the practical data concerning their enforcement practices. See, e.g., Letter from Robert B. Serino, OCC Deputy Chief Counsel, to Professor Michael P. Malloy (September 1, 1987) (insisting upon signing, without negotiation, of agreement indemnifying agency for his research); Letter from Professor Malloy to Mr. Serino (September 8, 1987) (refusing to sign). However, for the most part the regulatory staffs were of assistance to the author in this regard.

[10] See text and accompanying notes 476-94, infra.

[11] See generally text and accompanying notes 490-510, infra.

status, consolidations, reorganizations, but also the most intensive supervision of operations.[12]

Professor Davis's observation applies generally to many participants in the financial services industry[13] as well. Because participants in this industry have historically facilitated the transfer of money and credit within the society, government has traditionally sought to regulate both those who engage in banking functions and the activities undertaken by financial institutions generally. Another historical tradition intersects this concern with regulation of the credit transfer system: the apparent inability or unwillingness of the government to initiate regulation except in reaction to dramatic financial crises.[14]

The result of these twin historical influences has been that, in addition to the expected focus upon primary and secondary entry restrictions for the industry,[15] federal regulation of depository institutions has repeatedly focused upon the problem of monitoring and neutralizing situations involving possible threats to the stability and safety of participants in the industry or to the industry as a whole. Increasingly this problem has been addressed legislatively by providing the regulators with an ever broader array of enforcement powers to be used in neutralizing such threats.

The current range of enforcement powers in the hands of five more or less independent regulatory entities raises some natural concerns about the manner in which these powers have been mobilized across the spectrum of depository institutions. Such concerns may be called systemic concerns. In addition, the resultant increase in enforcement power in the hands of the regulators may also raise concerns over the practical effect that these developments have had on the regulated entities which are subject to the various regulators. Such concerns may be called fairness concerns. This study is interested in exploring both systemic and fairness concerns implicated by the broad range of enforcement powers available to the federal regulators of depository institutions.

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[12] 1 K. Davis, Administrative Law Treatise 247 (1958). See also 1 Malloy, supra note 1 at 2-4, 21-28.

[13] On the "financial services industry" generally, see Task Group on Regulation of Financial Services, Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services 16 (1984) (hereinafter "Task Group Report").

[14] See, e.g., 2 L. Loss, Securities Regulation 1162 (2d ed. 1961).

[15] On primary and secondary entry restrictions, see generally 1 Malloy supra note 1 at 22 n. 1.

1. Consistency and uniformity

One concern of the study arises from the fact that identical, or substantially similar, formal enforcement statutory provisions are being administered by five different federal agencies, each with respect to a different portion of the depository institutions industry. Are these authorities being implemented and applied, substantively and procedurally, in a uniform manner by these agencies? A major problem here is that the respective implementing regulations of the five agencies do not exhibit the degree of uniformity that one would expect in light of the fact that they are each implementing identical or virtually identical statutory authorities.

2. Accessibility of decisions and rationes decidendi

Another concern arises from the the institutional bias of these federal agencies towards confidentiality in their supervision and regulation of the institutions subject to their authority.[16] This is particularly true of APA enforcement hearings.[17] This limits access to administrative decisions under statutory enforcement authority and minimizes the likelihood that those outside the agencies will have anything like an accurate understanding of the ratio decidendi of a particular action. This concern affects both ALJs presiding over APA hearings as well as nonagency participants in such hearings.

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[16] See, e.g., Huber, Mandatory Disclosure of Information About Banks, 6 Ann. Rev. Banking L. 53, 75-76 (1987).

[17] See Letter from Robert B. Serino, supra note 9: information concerning formal administrative enforce-

3. Effectiveness and efficiency of the adjudicatory structure

A third concern involves the effectiveness and efficiency of the current adjudicatory structure, in which ALJs, detailed from other, nonbanking federal agencies are utilized from case to case on those occasions when an enforcement action actually proceeds to a formal stage. Given the general inaccessibility of administrative decisions (formal and informal) and the rationes decidendi of such decisions, it is reasonable to question whether, as a practical matter, the learning curve of an ALJ detailed to a banking agency for a particular hearing may make for an inefficient or ineffective process. Informal arrangements instituted by the Office of Administrative Law Judges at the Office of Personnel Management have attempted to address this concern on an ad hoc, year-to-year basis, but some attention needs to be given to structuring a more permanent arrangement.

B. Survey of Regulators and Functions

1. The Regulators

a. Office of the Comptroller of the Currency ("OCC")

The OCC is a bureau of the Department of the Treasury charged with the chartering, supervision and regulation of national banking associations, or national banks.[18] Congress has conferred broad powers on the Comptroller and his office to enable him to perform his

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ment actions "is not normally made available to the public."

[18] See 12 U.S.C. §§ 1 et seq. See also 1 Malloy, supra note 1 at 28-40.

supervisory and regulatory functions.[19]

Among other things, the Comptroller is required to examine periodically each national bank and to undertake corrective action to maintain the bank's safety and soundness.[20] The Comptroller's statutory authority, broadly discretionary, implies a "birth to death" approach to regulatory authority, ranging from the decision to charter a new national bank to the decision to declare it insolvent.[21] The Comptroller also has authority to recommend the suspension or removal of a national bank officer or director under certain conditions specified by statute.[22] Generally, because of his wide discretion and expertise, the Comptroller's decisions are not disturbed in judicial review unless his exercise of authority is found to have been arbitrary, capricious, abusive or contrary to law.[23]

b. Board of Governors of the Federal Reserve System ("Fed")

The Fed, as the U.S. central bank, is primarily charged with the responsibility of implementing monetary and credit policy and acting as "lender of last resort" to the financial system.[24] The Fed also administers federal laws concerning the reserves required to be held by member banks against their deposits.[25]

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[19] See First National Bank of Lamarque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980).

[20] See 12 U.S.C. § 481. On the concept of "safety and soundness" generally, see text and accompanying notes 339-403, infra.

[21] See, e.g., 12 U.S.C. §§ 21, 1814 (chartering), 191 (insolvency).

[22] See id. § 1818(b), (c), (e). See also text and accompanying notes 242-44, infra.

[23] See First National Bank of Lamarque, 610 F.2d at 1264; First Nat. Bank of Eden v. Department of the Treasury, 568 F.2d 610, 611 (8th Cir. 1978). See also text and accompanying notes 409-12, infra. Cf. Sunshine State Bank, 783 F.2d at 1584 (substantial evidence required for findings; arbitrary, capricious standard for determination of remedies).

While the Fed does not generally perform a chartering function,[26] it does have certain supervisory and examination functions with respect to state-chartered banks which are members of the Federal Reserve System.[27] In the enforcement area, aside from its regulation of bank holding companies and nonbanking affiliates, its statutory authority parallels that of the OCC, with the addition that it is the Fed which has the statutory authority to issue suspension and removal orders against officers and directors of national banks, on the Comptroller's recommendation.[28]

c. Federal Deposit Insurance Corporation ("FDIC")

The FDIC was established in 1933 to help restore public confidence in the banking system by providing a federal system of deposit insurance.[29] The FDIC is managed by a three-member board of directors, including the Comptroller of the Currency.[30]

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[24] See, e.g., 12 U.S.C. §§ 225a, 461(b)(4)(A)(i). See also 1 Malloy, supra note 1 at 40-47.

[25] See 12 U.S.C. § 461. This authority has been expanded, to apply fully to the required reserves of all depository institutions by March 1988. See id. § 461(b)(8). See also Pub. L. 96-221, Mar. 31, 1980, § 108, 94 Stat. 132, 141 (effective date provisions).

[26] But cf. 12 U.S.C. §§ 601, 611 (foreign branches, Edge Act corporations established pursuant to Fed approval).

[27] The member banks include all national banks in "the continental United States," as required by law (see id. §§ 221, 222), and those state-chartered banks and trust companies which have chosen to apply for, and have received, membership. See id. § 321.

[28] See text and accompanying notes 242-44, infra.

[29] See 1 Malloy, supra note 1 at 47-48.

The FDIC directly serves the twin goals of bank regulation: to maintain public confidence in the banking system by ensuring the viability of banks, and to protect individual depositors. Under the Federal Deposit Insurance Act ("FDIA"),[31] virtually all national banks and all state-chartered Fed member banks must maintain FDIC insurance; as a matter of federal law, insurance is otherwise optional for state-chartered banks.[32]

In addition, it is the function of the FDIC to maintain the viability of the banking system by providing regulatory supervision over state-chartered nonmember insured banks and by providing deposit insurance on a consistent, national basis. Since most banks fall into the category over which the FDIC has supervisory authority,[33] in this sense the federal government acts primarily through the FDIC to achieve its goals of a safe and sound banking system.[34]

d. Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Deposit Corporation ("FSLIC")

The FHLBB, originally created in 1932,[35] was authorized to establish and supervise a national system of federal home loan banks, through which federally chartered savings and loan associations and other specified thrift institutions could be supervised and regulated. The FSLIC, a constituent unit of the FHLBB, is intended to provide a system of deposit insurance for thrift institutions, on the general model of the FDIC deposit system,[36] with supervisory authority over state-chartered, FSLIC-insured thrift institutions.

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[30] 12 U.S.C. § 1812.

[31] Id. §§ 1811 et seq.

[32] Id. § 1814(b).

[33] See Task Group Report at 18 n. 6.

[34] See Rauscher Pierce Refsnes, Inc. v. F.D.I.C., 789 F.2d 313, 315 (5th Cir. 1986).

[35] See 12 U.S.C. § 1437(a). See also 1 Malloy, supra note 1 at 52-54.

Hence, the FHLBB and the FSLIC serve regulatory functions analogous to those of the OCC and the FDIC, and (through the Home Loan Bank System) the FHLBB also provides central bank functions with respect to thrift institutions which are members of that system. In the context of this study, it should be emphasized that the FHLBB and the FSLIC essentially protect the regulatory interest in the stability and safety of the thrift industry, particularly through the deposit insurance function.[37] Their statutory enforcement authority essentially parallels that of the federal bank regulators,[38] in addition to regulation of S&L holding companies and affiliates.

e. National Credit Union Administration ("NCUA")

The NCUA is yet another legacy of the financial crisis that beset the country beginning in 1929, but its creation under the Federal Credit Union Act of 1934 ("FCUA")[39] was not specifically prompted by any systematic failure of credit unions.[40] Nevertheless, the NCUA currently presides over a federal regulatory system which includes all federally chartered credit unions and state-chartered credit unions the shares, or deposits, of which are federally insured.

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[36] See 12 U.S.C. §§ 1724 et seq. See also 1 Malloy, supra note 1 at 54-55.

[37] See Gulf Fed. S. & L. Assn v. Federal Home Loan Bank Bd., 651 F.2d 259, 262 (5th Cir. 1981), cert. denied, 458 U.S. 1121 (1982).

[38] See text and accompanying notes 127-37, infra.

[39] 12 U.S.C. § 1751 et seq. See also 1 Malloy, supra note 1 at 60-61.

[40] See, e.g., Barany v. Buller, 670 F.2d 726, 733 & n. 16 (7th Cir. 1982).

Chartering, insuring, supervisory and examining functions, as well as the liquidity function of a "central bank," are each the responsibility of the NCUA and its constitutive units. The share or deposit insurance for both state and federally chartered credit unions is provided by the NCUA through its Office of Insurance Fund.[41] As with commercial banks and thrifts, insurance is required for federally chartered credit unions[42] and is voluntary in the case of state-chartered credit unions.[43] Since 1978, there has existed a National Credit Union Central Liquidity Facility[44] which assists credit unions experiencing liquidity problems by granting them loans.[45] The NCUA has statutory enforcement powers that generally parallel those of the federal banking agencies.[46]

2. Enforcement functions

a. Cease and desist powers

After the power to revoke the charter[47] or to terminate the deposit insurance of a depository institution,[48] the oldest formal regulatory enforcement power of the regulators is the power to issue a cease and desist order,[49] an administrative functional equivalent of an injunction, which requires an APA hearing.[50] As to depository institutions, this power has been granted under the FDIA to the Comptroller, with respect to national banks; to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[51] A parallel power has been granted under the Home Owners' Loan Act of 1933 ("HOLA"), as amended,[52] with respect to federally chartered thrift associations, to the FHLBB,[53] and under the National Housing Act ("NHA"),[54] with respect to insured thrift institutions,[55] to the FSLIC.[56] Substantially similar power has been granted under the FCUA, with respect to federally chartered or insured credit unions, to the NCUA Board.[57]

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[41] 12 C.F.R. § 790.2(b)(7).

[42] See 12 U.S.C. § 1781(a).

[43] Id.

[44] Id. § 1795b. See also 12 C.F.R. § 790.2(d).

[45] 12 U.S.C. §§ 1795, 1795e.

[46] See text and accompanying notes 138-44, infra.

[47] See, e.g., 12 U.S.C. §§ 93 (forfeiture of national bank charter), 1766(b)(1) (revocation of federal credit union charter).

[48] See id. §§ 1730(a) (termination of deposit insurance; FSLIC), 1818(a) (same; FDIC).

These grants of authority include the power to issue temporary cease and desist orders, the administrative functional equivalent of a temporary restraining order. This power is available in situations in which a violation or threatened violation of law or unsafe or unsound practice "is likely to cause insolvency or substantial dissipation of assets or earnings" of a depository institution or "is likely to seriously weaken [its] condition . . . or otherwise seriously prejudice the interests of its depositors" prior to completion of the cease and desist proceedings.[58]

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[49] See generally id. §§ 1464(d)(2) (federal thrift associations), 1730(e)(1) (insured thrift associations), 1786(e)(1) (insured credit unions), 1818(b)(1) (insured banks).

[50] See, e.g., 12 U.S.C. § 1818(b)(1). See generally text and accompanying notes 245-51, infra.

[51] See 12 U.S.C. §§ 1813(q), 1818(b) (cease and desist powers granted to the "appropriate Federal banking agency").

[52] Id. §§ 1461 et seq.

[53] See id. § 1464(d)(2).

[54] Id. §§ 1701 et seq.

[55] For the definition of "insured institution" in this context (which includes federally chartered and federally insured, state-chartered savings and loan associations), see id. §§ 1724(a), 1726(a).

[56] See id. § 1730(b)(1).

[57] See id. § 1786(e)(1).

b. Suspension and removal powers

The regulatory authority to suspend or remove directors and officers of depository institutions,[59] subject to an APA hearing and limited review,[60] is intended to increase the flexibility and effectiveness of the regulators' enforcement efforts by the direct targetting of those efforts against individuals who participate in the management of depository institutions.[61] This power has been granted under the FDIA to the Comptroller and the Fed, with respect to national banks;[62] to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[63] A parallel power has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB[64] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[65] Substantially similar power has been granted under the FCUA to the NCUA Board.[66]

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[58] *Id*. § 1818(c)(1). *See also id*. §§ 1464(d)(3) (temporary cease and desist orders; FHLBB), 1730(f) (same; FSLIC), 1786(f) (same; NCUA).

[59] *See id*. §§ 1464(d)(4), 1730(g), 1786(g), 1818 (e).

[60] *See*, *e.g.*, 12 U.S.C. § 1818(e)(5). *See generally* text and accompanying notes 158-61.

[61] *See* text at notes 89-93, *infra*.

[62] The Comptroller initiates removal proceedings, but the Fed has the exclusive statutory authority to determine whether an order should issue. 12 U.S.C. § 1818(e)(4). *Cf*. text and accompanying notes 105-106, *infra*.

[63] *See id*. § 1818(e).

[64] *See id*. § 1464(d)(4).

In addition, there is also specific statutory authority in the Comptroller, the Fed and the FDIC to suspend or remove a director or officer of an insured bank charged with a felony.[67] This summary authority was questioned on due process grounds[68] and was subsequently amended to provide for a non-APA hearing or appeal of any such notice of suspension or removal order.[69] Parallel authority has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB[70] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[71] Substantially similar authority has been granted under the FCUA to the NCUA Board.[72]

c. Civil money penalties

The power to assess civil money penalties,[73] subject to an APA hearing on the timely request of the assessed party,[74] is a relatively recent addition to the regulator's menu of enforcement powers. This power has been granted under the FDIA to the Comptroller, with respect to national banks; to the Fed, with respect to state-chartered member banks; and, to the FDIC, with respect to state-chartered, nonmember insured banks.[75] A parallel power has been granted under the HOLA, with respect to federally chartered thrift associations, to the FHLBB[76] and under the NHA, with respect to insured thrift institutions, to the FSLIC.[77] Substantially similar power has been granted under the FCUA to the NCUA Board.[78]

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[65] See id. § 1730(g).

[66] See id. § 1786(g).

[67] See id. § 1818(g).

[68] See Feinberg v. FDIC, 420 F. Supp. 109 (D.D.C. 1976).

[69] See 12 U.S.C. § 1818(g)(1), (3). See also text and accompanying note 94, infra.

[70] See 12 U.S.C. § 1464(d)(5).

[71] See id. § 1730(h).

[72] See id. § 1786(h).

[73] See id. §§ 1464(d)(8)(B), 1730(k)(3), 1786(j)(2), 1818(i)(2). See also id. §§ 504, 505 (Federal Reserve Act).

[74] See, e.g., 12 U.S.C. § 1818(i)(2)(iii). See

d. Other powers

For the most part, except for historical perspective, this study does not discuss the relatively drastic (and, consequently, rarely used) powers to revoke charters or to terminate deposit insurance. The study also does not give attention to the body of enforcement powers that the Comptroller, the Fed, the FDIC and the FHLBB possess under section 12(i) of the Securities Exchange Act of 1934[79] with respect to the securities of institutions registered under that act.[80] Finally, it should be noted that there are a number of specialized areas of regulatory enforcement, such as the Depository Institutions Management Interlocks Act ("DIMIA"),[81] that are generally outside the scope of

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generally text at notes 186-87, infra.

[75] See 12 U.S.C. § 1818(i)(2).

[76] See id. § 1464(d)(8)(B).

[77] See id. § 1730(k)(3).

[78] See id. § 1786(j)(2).

[79] 15 U.S.C. § 78l(i). See generally 1 Malloy, supra note 1 at 491-93.

[80] See 15 U.S.C. § 12(a), (b), (g). Cf. 1 Malloy, supra note 1 at 498-501.

[81] 12 U.S.C. §§ 3201 et seq. See generally 1 Malloy, supra note 1 at 244-45.

this study, but which nevertheless may interact with the enforcement powers under consideration in the present context.[82]

II. ANALYSIS OF STATUTORY AUTHORITIES

A. Introduction

In the course of congressional consideration of the problem of administrative enforcement of bank regulatory policy, we can observe a fairly consistent and longstanding pattern of statutory development in the direction of a wider range of enforcement devices, diversified in their relative intensity, dating from the early, drastic remedy of deposit insurance termination[83] to the relatively recent authority for the imposition of civil money penalties.[84] Related to this

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[82] See, e.g., 12 U.S.C. §§ 1464(d)(15) (meaning of "officer," "director" in enforcement involving interlocking relationships; FHLBB), 1730(r)(4) (same; FSLIC), 1818(e)(5) (same; bank regulatory agencies). For examples of statutory authorities with respect to other specialized areas of regulatory enforcement, see notes 260-61, 274, 282, 286, infra.

[83] On June 16, 1933, the Glass-Steagall Act was signed into law. Pub. L. No. 73-65, 48 Stat. 162 (1933). (For a legislative history of the Glass-Steagall Act, see generally 2 M. P. Malloy, The Corporate Law of Banks 559-75 (1988).) Section 8 of the new act amended the Federal Reserve Act ("FRA") by inserting a new section 12B, which provided for the creation of the FDIC. 48 Stat. at 168 (codified at 12 U.S.C. § 264). Section 12B(i) provided authority for cancellation of FDIC stock as an enforcement remedy. Id. at 171-72 (codified at 12 U.S.C. § 264(i)). Two years later, after considerable debate, section 12B(i) was amended to substitute the insurance termination power for the stock cancellation power. See 79 Cong. Rec. 13,655, 13,711 (1935).

Aside from relatively minor amendments to section 12B of the FRA (see generally Pub. Res. No. 74-83, 49 Stat. 1237 (1936) (amending 12 U.S.C. § 264(n)(4)); Pub. L. No. 75-116, 52 Stat. 442 (1938) (amending 12 U.S.C. § 264(l)(7)); Pub. Res. No. 75-116, 52 Stat. 767

(1938) (amending 12 U.S.C. § 264(n)(4)); Pub. L. No. 76-135, 53 Stat. 842 (1939) (amending 12 U.S.C. § 264(y)); Pub. L. No. 78-37, § 1, 57 Stat. 65 (1943) (amending 12 U.S.C. § 264(h)(1)); Pub. L. No. 80-363, 61 Stat. 773 (1947) (amending 12 U.S.C. § 264 and directing FDIC to retire its capital stock)), the next significant congressional action with respect to the insurance provisions contained in section 12B occurred in 1950, with the withdrawal of the provision from the FRA and its redesignation as a separate enactment, the FDIA. Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified at 12 U.S.C. §§ 1811 _et_ _seq_.). (Paragraph 12B(i) itself had been amended only once prior to the enactment of Pub. L. No. 81-797. _See_ Pub. L. No. 81-706, 64 Stat. 457 (1950) (minor technical amendment to 12 U.S.C. § 264(i)(2).) Paragraph (i) of FRA section 12B was recodified as section 8 of the new FDIA. _See_ Pub. L. No. 81-797, 64 Stat. 873, 879-81 (1950) (codified as 12 U.S.C. § 1818(i)). Moreover, the board's power to terminate involuntarily a bank's deposit insurance was slightly modified. H.R. Rep. No. 2564, 81st Cong., 2d Sess., _reprinted_ _in_ 1950 U.S. Code Cong. & Ad. News 3765, 3771 (hereinafter "H.R. Rep. No. 2564"). Section 8(c), for example, inserted a new provision authorizing the board to terminate the insured status of a bank that did not receive deposits, excluding trust funds. Pub. L. No. 81-797, 64 Stat. at 880-81. _See_ _also_ H.R. Rep. No. 2564 at 3771.

[84] The civil money penalty device became even more modest and fine-tuned with the passage of the Garn-St Germain Depository Institutions Act of 1982 ("DIA"), Pub. L. No. 97-320, 96 Stat. 1469 (1982). Aside from many technical amendments to and refinements of the statutory provisions concerning bank regulatory enforcement, _see_ S. Rep. No. 536, 97th Cong., 2d Sess., _reprinted_ _in_ 1982 U.S. Code Cong. & Ad. News 3054, 3080, the DIA gave the agencies explicit discretionary authority to assess, compromise, modify or remit civil money penalties. _See_ Pub. L. No. 97-320, § 424(c), (d)(6), _amending_ 12 U.S.C. § 1818(i)(2)(i). The DIA also increased the time available for appeal from a civil money penalty order, from ten to twenty days. _See_ _id_., § 424(e), _amending_ 12 U.S.C. § 1818(i)(2)(iv).

line of development as a leitmotif is the continual emphasis throughout these legislative developments on the need to increase the flexibility and discretion available to the regulators in responding to enforcement problems.[85] Finally, there has been a relative shift in emphasis, at the statutory level, towards a targetting of enforcement devices at individuals who stand in some control relationship to banks that are the subject of enforcement concerns.

Thus, there has been a sense expressed throughout congressional consideration of these measures that there was a need to afford the regulators the authority to tailor enforcement actions to the needs of particular cases,[86] and that in that regard it was not necessarily appropriate or reasonable to limit the availability of the cease and desist power in particular to actions against a bank alone.[87] Likewise, the regulators have obtained clarification of the availability of the temporary cease and desist power as well in actions involving individuals.[88]

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[85] This search for flexible responses and a range of diversified enforcement devices has been further expanded by administrative resort to such interim measures, short of cease and desist orders, as the informal agreement or the "memorandum of understanding" (a creature of administrative practice, see text and accompanying notes 488-89, infra), as well as the "formal agreement" (statutorily based, see, e.g., 12 U.S.C. § 1818(b) (1); see also text and accompanying note 487, infra), to resolve enforcement problems outside of the formal procedural context contemplated by the statutes. In addition, the dominant administrative practice of administrative consent orders (see text and accompanying note 482, infra) has further removed practice from the formalities contemplated by the statutes.

[86] See, e.g., 124 Cong. Rec. 36,146 (1978) (remarks of Senator Proxmire). See also H.R. Rep. No. 1383, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 9273, 9279-80 (hereinafter "H.R. Rep. No. 1383").

[87] See, e.g., H.R. Rep. No. 1383 at 9289-90.

This increased congressional attention on individuals as objects of regulatory enforcement can also be seen in congressional treatment of the removal authority.[89] Prior to the enactment of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 ("FIRICA"),[90] the agencies had particularly complained that the extant provision was unduly restrictive, and that it hampered their efforts to act in a timely manner.[91] FIRICA responded to these concerns by authorizing removal not only for dishonest conduct but also for a willful or continuing disregard for safety and soundness of a bank.[92] In addition, the Comptroller was finally given the authority to initiate removal proceedings against directors and officers of national banks, though the Fed still retained the authority to issue the removal orders in such cases.[93] At the same time, however, counterbalancing this greater facility for exercising the removal power were new provisions for non-APA hearings before the appropriate federal banking agency before a director or officer is summarily suspended or removed on account of criminal charges.[94]

To this theme of increased attention and flexibility with respect to enforcement actions directed at individuals FIRICA added a broader theme of flexibility in the range of enforcement devices available to the regulators. Power was granted to the regulators to assess civil money penalties of not more than $1,000 per day, per violation of an outstanding cease and desist order,[95] subject to certain specified procedural and substantive conditions.[96] This power was specifically intended to afford the regulators more flexibility to secure compliance by individuals and institutions without resort to the relatively severe penalties that would otherwise have been available.[97]

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[88] See Pub. L. No. 95-630, § 107(c)(1) (to be codified at 12 U.S.C. § 1818(c)(1)-(2)).

[89] 12 U.S.C. § 1818(e).

[90] Pub. L. No. 95-630, 92 Stat. 3641 (1978).

[91] See, e.g., H.R. Rep. No. 1383 at 9290.

[92] See Pub. L. No. 95-630, § 107(d)(1), amending 12 U.S.C. § 1818(e).

[93] See id.

[94] See id. § 111(a)(1), amending 12 U.S.C. § 1818(g). See also H.R. Rep. No. 1383 at 9290. See generally text and accompanying notes 172-74, infra.

Thus, what has emerged from over forty years of legislative attention to the problems of bank regulatory enforcement is a delicately balanced structure of administrative enforcement. This structure gives institutional value on the one hand to the availability of a flexible array of carefully targetted enforcement powers, and on the other to the protection of the interests of targetted individuals, primarily through the availability of APA hearings (except in the case of summary suspension/removal on account of criminal charges) and limited judicial review of administrative enforcement action.

In practice, however, this structure has not been fully realized. Consent orders and informal means of enforcement abound in bank regulatory enforcment; APA hearings are decidedly the exception. The rules of practice applicable to APA hearings are somewhat sketchy, and formal administrative decisions, as well as the rationes decidendi for such decisions, are not readily accessible to the public. Underscoring the relatively minor role actually played by APA hearings in bank regulatory enforcement, the agencies do not employ their own ALJs, but rely instead on detailed ALJs, seconded on an ad hoc basis. Thus, the institutional bias of the agencies, in favor of informality, confidentiality and speed, has pushed the flexibility inherent in congressional enactments in this area far beyond what was contemplated by those enactments themselves.

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[95] _See_ Pub. L. No. 95-630, § 107(e)(1), _amending_ 12 U.S.C. § 1818(i).

[96] _See id_. _See also_ text and accompanying notes 185-95, _infra_.

[97] _See_ H.R. Rep. No. 1383 at 9289.

B. Legislative History: Selected Aspects

1. First steps toward flexibility

In March 1966, the administration submitted to the Senate a bill granting the federal banking regulators[98] the authority to issue cease and desist orders and orders of suspension and removal, subject to specific limitations.[99] The stated purpose of the bill was to provide these agencies with the power to prevent unsafe and unsound practices and violations of law or regulation through a means less drastic than termination of deposit insurance or through conservatorship or receivership.[100] Thus, the sponsoring agencies argued:

> [O]ur financial system has not been entirely free from supervisory problems, and unlawful, unsound, or irregular practices have appeared in some cases. Even though few in number, improperly conducted institutions could cause public concern that might extend to the entire industry. In such cases, it is essential that the Federal supervisory agencies have the statutory and administrative facility to move quickly and effectively to require adherence to the law and cessation and correction of unsafe or improper practices.
>
> Existing remedies have proven inadequate. On the one hand they may be too severe for many situations, such as taking custody of an institution or terminating its insured status. On the other they may be so time consuming and cumbersome that substantial injury occurs to the institution

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[98] *I.e.*, the Comptroller, the Fed, the FDIC and the FHLBB.

[99] *See* S. Rep. No. 1482, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3532, 3534 (hereinafter "S. Rep. No. 1482").

[100] *See id*. at 3536.

before remedial action is effected.[101]

The Senate Committee essentially agreed that the proposed legislation was needed. However, it did revise the bill in certain respects, in order to reconcile the competing interests of those affected by the proposed legislation. First, the committee proposed to restrict the issuance of suspension and removal orders to cases involving personal dishonesty on the part of directors or officers, not just differences of opinion between bank officials and regulators over management problems. This limitation, together with the individual's right to seek judicial review of the order and another amendment requiring the APA hearing to be private unless the agency and the individual agreed otherwise, appeared to reduce the potential for administrative abuse.[102]

Second, the committee was concerned with the effect the bill would have on the dual banking system,[103] and it therefore endorsed a proposal to the effect that, in cases involving state-chartered institutions, the appropriate state supervisory authority was to be notified and given an opportunity to take corrective supervisory action of its own. The proposal would not only protect individuals from arbitrary and capricious federal government action, but would also recognize the importance of state supervisory authorities in the dual banking system.[104]

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[101] Id.

[102] Id. at 3539. The committee noted that "the power to suspend or remove an officer or director of a bank . . . is an extraordinary power, which can do great harm to the individual affected and to his institution and to the financial system as a whole. [Therefore,] [i]t must be strictly limited and carefully guarded." Id.

Third, the original version of the bill authorized the Comptroller, the only one of the four affected federal supervisory agencies consisting of a single individual rather than a collegial body, to suspend or remove officials of a national bank. The committee concluded that this quasi-judicial function should be entrusted to a collegial body rather than a single official.[105] Accordingly, it recommended that the Comptroller be required to obtain approval of the Fed before proceeding to suspend or remove an officer of a national bank.[106]

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[103] On the dual banking system, see 1 Malloy, _supra_ note 1 at 29, 31-33. _See generally_ Scott, _Patchwork Quilt: State and Federal Roles in Bank Regulation_, 32 Stan. L. Rev. 687 (1980); Scott, _Dual Banking System: Model of Competition in Regulation_, 30 Stan. L. Rev. 1 (1977); Kreider, _American Banking: Structure, Supervision and Strengths_, 92 Banking L.J. 437 (1975); Golembe, _Our Remarkable Banking System_, 53 Va. L. Rev. 1091 (1967); Wille, _State Banking: A Study in Dual Banking_, 31 L. & Contemp. Prob. 734 (1966); Redford, _Dual Banking: A Case Study in Federalism_, 31 L. & Contemp. Prob. 749 (1966).

[104] S. Rep. No. 1482 at 3538. The committee stated that this proposal "emphasizes the role of the State chartering and supervisory authorities, and in no way lessens the status of these State authorities." _Id._ at 3539.

[105] _Id._ at 3539-40.

[106] _See id._ at 3535, 3540. However, the Senate Subcommittee on Financial Institutions deleted the

The final compromise version of the bill provided that hearings would be private unless the agency, in its discretion, determined that a public hearing was necessary in order to protect the public interest.[107] It also extended the expiration date of the new authorities to June 30, 1972.[108] Furthermore, the Senate accepted a House amendment providing "for the violation of a condition imposed in writing by an agency to be grounds for the issuance of a cease and desist order the condition must have been imposed in connection with the granting of an application or other request by the institution."[109] The Senate bill had not contained such a provision.[110]

The Conference Report was accepted by both houses.[111] On October 16, 1966, the bill was enacted into law as the Financial Institutions Supervisory Act

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provision requiring the Comptroller to obtain Fed approval before issuing a suspension or removal order. Instead, it preferred that the Fed itself should exercise the power to remove national bank officials, as under the authority of section 30 of the Banking Act of 1933, 12 U.S.C. § 77, *repealed*, Pub. L. No. 89-695, § 207, 80 Stat. 1055 (1966), and it would make the Comptroller a member of the Fed board in such cases. S. Rep. No. 1482 at 3535, 3540. The subcommittee also adopted an amendment proposed by Senator Thurmond, requiring that the notice given to state supervisory authorities specify the time within which corrective supervisory action must be taken. *Id*. at 3535.

[107] *See* H.R. Conf. Rep. No. 2232, 89th Cong., 2d. Sess., *reprinted in* 112 Cong. Rec. at 26,212 (1966).

[108] *Id*.

[109] 112 Cong. Rec. 26,476 (1966). Violation of a "written agreement entered into with the agency" also constituted a basis for a cease and desist order. *See* 12 U.S.C. § 1818(b)(1).

[110] 112 Cong. Rec. 26,476 (1966).

[111] *Id*. at 26,212, 26,476.

of 1966 ("FISA").[112]

2. Coverage of holding companies and foreign banks

In 1974 Congress again addressed the authorities granted by FISA. It adopted an amendment to section 8(b) of the FDIA[113] which expanded the scope of the cease and desist powers to include bank holding companies and their nonbanking subsidiaries.[114] The Senate Committee on Banking, Housing and Urban Affairs noted in its report that "[u]nder present law, the only available means of dealing with unsafe and unsound practices or violations on the part of a parent holding company is through the sanctions contained in criminal law."[115] The committee took the position that the cease and desist authority allowed supervisory agencies "to move quickly and effectively to correct unsound . . . practices . . . and the extension of this authority [would] better equip the agencies to assure that financial institutions are not endangered . . . [by the activities of] parent holding companies or . . . [their nonbanking] subsidiaries."[116] The committee emphasized, however, that it did not expect the agencies to "use this authority to interfere unduly in the affairs of nonbank subsidiaries."[117]

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[112] See Pub. L. No. 89-695, 80 Stat. 1046 (1966). Title IV of the act, which made the authorized powers temporary, was repealed by Pub. L. No. 91-609, tit. IX, § 908, 84 Stat. 1811 (1970).

[113] See 12 U.S.C. § 1818(b)(3).

[114] Pub. L. No. 93-495, tit. I, § 110, 88 Stat. 1506 (1974). Title I was entitled Amendments to and Extensions of Provisions of Law Relating to Federal Regulation of Depository Institutions. The act was the result of various individual bills from both houses which were consolidated and incorporated as an amendment to the House bill, H.R. 11221. Sen. Comm. Print, 93d Cong., 2d Sess. 27 (1974). The addition of section 8(b)(3) was first introduced by the Senate bill. H.R. Conf. Rep. No. 1429, 93d Cong., 2d Cong., reprinted in 1974 U.S. Code Cong. & Ad. News 6148, 6150 (joint explanatory statement of the Committee of Conference). Although the House bill did not have a comparable provision, the House acceded to the Senate version. Id.

[115] S. Rep. No. 902, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 6119, 6128.

Four years later, the Senate Banking Committee noted that

> [t]he growth in number and size of foreign banking operations, and their ever-increasing importance to the structure of the banking system and to the functioning of money and credit markets has created the need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their activities in the United States. . . .[118]

With regard to section 8 of the FDIA, the Senate version of the bill responding to this perceived need for further federal regulation added only one paragraph, section 8(b)(4), empowering the federal bank agencies to issue cease and desist orders "to any foreign bank or holding company to which subsection (a) of section 8 of the International Banking Act of 1978 applies and to any nonbank subsidiary of such bank or company."[119] Unlike the original bill,[120] the Senate version did not include a separate paragraph extending the cease and desist authority to "any branch, agency, and commercial lending company controlled by foreign banks."[121]

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[116] Id.

[117] Id.

[118] S. Rep. No. 1073, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 1421, 1422 (hereinafter "S. Rep. No. 1073").

The bill was considered and passed by the Senate as amended.[122] Subsequently, the House concurred in the Senate amendments,[123] and on September 17, 1978, the International Banking Act of 1978 ("IBA") was signed into law.[124]

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[119] Id. at 1444. Section 8(a) of the International Banking Act of 1978, 12 U.S.C. § 3106(a), provides as follows:

> Except as otherwise provided in this section[,] (1) any foreign bank that maintains a branch or agency in a State, (2) any foreign bank or foreign company controlling a foreign bank that controls a commercial lending company organized under State law, and (3) any company of which any foreign bank or company referred to in (1) and (2) is a subsidiary shall be subject to the provisions of the Bank Holding Company Act of 1956[, 12 U.S.C. § 1841 et seq.], and to section 1850 of this title [concerning right of possible competitors of an applicant before the Fed to participate in proceedings] and [id. §§ 1971 - 1978, concerning prohibited tying arrangements,] to the same manner and to the same extent that bank holding companies are subject thereto. . . .

[120] See 124 Cong. Rec. 3000 (1978).

[121] See id. at 9089. Cf. id. at 26,128.

[122] Id. at 24,885, 26,123.

[123] Id. at 26,726. Representative Reuss stated that the Senate version of H.R. 10899 refined the original version, yet retained the intent of the House bill in all important respects. That is, it not only reaffirmed the principle of "national treatment" of foreign banks operating within the United States, but also recognized the unique character of foreign banking. Id. at 26,733.

3. Further attention to individuals

The IBA was followed in short order by FIRICA.[125] Among other things, FIRICA expanded the scope of the cease and desist remedy to include not only banks but also individuals such as directors, officers, controlling shareholders and other persons acting for an insured bank.[126]

4. Thrift institutions and credit unions

The legislative history of the major enforcement authorities of the FHLBB, the FSLIC and the NCUA generally parallels that of the FDIA. The 1966 amendments to the HOLA[127] reorganized the basic enforcement provision, adding the cease and desist,[128] temporary cease and desist,[129] and suspension and removal authorities[130] corresponding to those granted to the federal bank regulators. At the same time, similar authority was granted to the FSLIC in amendments to the NHA.[131]

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[124] Pub. L. No. 95-369, 92 Stat. 607 (1978).

[125] Pub. L. No. 95-630, 92 Stat. 3641 (1978).

[126] *See id.* § 107(a)(1) (to be codified at 12 U.S.C. § 1818(b)(1)). Further steps toward flexibility are evident from the amendments to the regulator's enforcement powers in the DIA. *See, e.g.*, note 84, *supra*.

[127] Pub. L. No. 89-695, § 101(a), 80 Stat. 1028 (1966) (to be codified at 12 U.S.C. § 1464(d)(2)-(5), (7)-(10), (12)(A)-(B), (13), (14)). *See generally* 1966 U.S. Code Cong. & Ad. News 3532.

[128] 12 U.S.C. § 1464(d)(2).

[129] *Id.* § 1464(d)(3).

[130] *Id.* § 1464(d)(4)-(5).

[131] *See* Pub. L. No. 89-695, § 102(a), 80 Stat. at 1036 (to be codified at 12 U.S.C. § 1730(b)-(q)).

The next significant amendment of the HOLA for present purposes occured in 1978,[132] which, among other things, (i) extended the cease and desist[133] and temporary cease and desist powers[134] to cover individuals participating in the management of federally chartered associations, (ii) amended the grounds for suspension and removal of officers and directors,[135] and added civil money penalty authority.[136] Similar changes were made in the FSLIC's authority under the NHA.[137]

The basic enforcement provisions of the FCUA were added in 1970,[138] and they were substantially similar to the corresponding authorities which the federal bank regulators possessed at that time. Aside from a modest adjustment in the language of the removal provisions in

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[132] Pub. L. No. 95-630, §§ 107, 111, 208, 92 Stat. 3651 *et seq*. (1978) (to be codified at 12 U.S.C. § 1464 (d)(2)-(5), (7)-(8), (12)-(13), (15)). *See generally* 1878 U.S. Code Cong. & Ad. News 9273. Minor modifications were also made in these authorities by the DIA in 1982. *See* Pub. L. No. 97-320, §§ 114(b), (c), 351, 424, 427(a), 96 Stat. at 1475 *et seq*. (to be codified at 12 U.S.C. § 1464(d)) (HOLA enforcement authorities), *id*. §§ 115, 424, 425(a), 427(b), 96 Stat. at 1476 *et seq*. (to be codified at 12 U.S.C. § 1730) (NHA enforcement authorities).

[133] *See* 12 U.S.C. § 1464(d)(2)(A).

[134] *Id*. § 1464(d)(3)(A)-(B).

[135] *Id*. § 1464(d)(4)(A)-(B).

[136] *Id*. § 1464(d)(8)(B).

[137] *See* Pub. L. No. 95-630, §§ 107(a)(2), (c)(2), (d)(2), 111(b)(1), 92 Stat. at 3650 *et seq*. (to be codified at 12 U.S.C. § 1730(e)(1), (f)(1)-(2), (g)(1)-(2), (h)(1)-(2)).

[138] *See* Pub. L. No. 91-468, § 1(3), 84 Stat. 1003 (1970) (to be codified at 12 U.S.C. § 1786). *See generally* 1970 U.S. Code Cong. & Ad. News 4166.

1977,[139] the next significant development for present purposes was the enactment of amendments to the FCUA enforcement provisions in 1978.[140] As with the contemporaneous amendments to the authorities of the other federal regulators, the 1978 FCUA amendments had the effect of, among other things, (i) extending the cease and desist[141] and temporary cease and desist powers[142] to cover individuals participating in the management of federally chartered associations, (ii) amending the provisions of the suspension and removal authority,[143] and adding civil money penalty authority.[144]

C. Major Authorities

1. Cease and desist powers

The FDIA authorizes the regulators to initiate cease-and-desist proceedings whenever, in the opinion of the regulator,

> any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is engaging or has engaged, or the [regulator] has reasonable cause to believe

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[139] SeePub. L. No. 95-22, § 307, 91 Stat. 52 (1977) (to be codified at 12 U.S.C. § 1786(g)(1)-(2)).

[140] Pub. L. No. 95-630, §§ 107(a)(4), (c)(4), (d)(4), (e)(4), 111(d), 502(b), 92 Stat. at 3652 et seq. (to be codified at 12 U.S.C. § 1786(e)-(o)). See generally 1978 U.S. Code Cong. & Ad. News 9273. Minor modifications were also made in these authorities by the DIA in 1982. See Pub. L. No. 97-320, §§ 132(a), (c), (d), (e), (f), 141(a)(8), 424(a), d)(9), (e), 427(c), 96 Stat. at 1487 et seq. (to be codified at 12 U.S.C. § 1786(g)(3)-(6), (h)-(p)).

[141] 12 U.S.C. § 1786(e)(1).

[142] Id. § 1786(f).

[143] See id. § 1786(h).

[144] Id. § 1786(j)(2).

> . . . is about to engage, in an unsafe or unsound practice[145] in conducting the business of such bank, or is violating or has violated, or the [regulator] has reasonable cause to believe . . . is about to violate, a law, rule or regulation, or any condition imposed in writing by the [regulator]. . . or any written agreement entered into with the [regulator]. . . .[146]

A notice would be served upon the bank or the director, officer or other person involved, stating the facts constituting the violation or practices and setting an administrative hearing.[147] Upon findings on the record (or upon consent of the noticed parties), an order to cease and desist from the practice or violation will issue.[148] The order generally becomes effective thirty days after service of the order on the bank or other person involved,[149] except to the extent it is stayed, modified, terminated or set aside by the regulator or a reviewing court.[150] The FDIA also provides authority for temporary cease-and-desist orders to meet exigencies prior to completion of the cease-and-desist proceedings.[151]

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[145] On the meaning of the term "unsafe or unsound practice," see Gulf Fed. S. & L. v. Federal Home Bank Bd., 651 F.2d 259 (5th Cir. 1981); First Nat. Bank of Lamarque v. Smith, 610 F.2d 1258 (5th Cir. 1980); Independent Bankers Ass'n of America v. Heimann, 613 F.2d 1164 (D.C.Cir. 1979), cert. denied 449 U.S. 823 (1980); First Nat. Bank of Eden v. Department, 568 F.2d 610 (8th Cir. 1977). See also text at notes 339-403, infra. Cf. Groos Nat. Bank v. Comptroller of Currency, 573 F.2d 889 (5th Cir. 1978). See generally E. L. Symons & J. J. White, Banking Law 574-77 (2d ed. 1984).

[146] 12 U.S.C. §1818(b)(1). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(2)(A), 1730(e)(1), 1786(e)(1).

[147] Id. On the procedures involved in cease-and-desist hearings, see text and accompanying note 196, infra. See also 12 C.F.R. §§ 19.0-19.21 (OCC); 263.1-263.21, 263.35-263.40 (Fed); 308.1-308.22, 308.32-308.38 (FDIC). These APA hearings must take place in the federal judicial district in which the home office of the bank is located. See 1818(h)(1). See also 12 C.F.R. §§ 509.1-509.22 (FHLBB; cease-and-desist proceedings under 12 U.S.C. §§ 1464(d)(2), 1730(e)); §§ 747.101-747.121, 747.301-747.306 (NCUA; cease-and-desist proceedings under 12 U.S.C. § 1786(e)-(f)). For cases reviewing cease-and-desist orders, see, e.g., First Nat. Bank of Bellaire v. Comptroller, 697 F.2d 674 (5th Cir. 1983); First Nat. Bank of Scotia v. United States, 530 F. Supp. 162 (D.D.C. 1982). See generally M. A. Cobb, Federal Regulation of Depository

2. Suspension and removal powers

The FDIA specifically provides for suspension or removal of directors and officers of insured banks and for prohibition of further participation in management of the affairs of an insured bank by any individual. The FDIA authorizes the regulator to initiate such proceedings against a director, officer or other controlling individual whenever, in the opinion of the regulator,

> any director or officer of an insured bank has committed any violation of law, rule, or regula-

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Institutions para. 5.08 (1984).

[148] 12 U.S.C. § 1818(b)(1). See also id. §§ 1464 (d)(2), 1730(e)(1), 1786(e)(1).

[149] Id. § 1818(b)(2). Consent orders become effective according to their own terms. See id. Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(2)(B), 1730(e)(2), 1786(e)(2).

[150] Id. § 1818(b)(2). See also id. §§ 1464(d)(2) (B), 1730(e)(2), 1786(e)(2). On judicial review and enforcement of cease-and-desist orders, see id. §§ 1464 (d)(7)(B), (8)(A), 1730(j)(2), (k)(2), 1786(j)(2), (k) (1), 1818(h), (i).

[151] Id. 1818(c), (d). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d) (3)(A), 1730(f), 1786(f).

> tion or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice[152] in connection with the bank, or has committed or engaged in any act, omission or practice which constitutes a breach of his fiduciary duty as such director or officer, and the agency determines that the bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty or that the director or office[r] has received financial gain by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or one which demonstrates a willful or continuing disregard for the safety or soundness of the bank. . . .[153]

Similar authority has also been conferred on the regulators with respect to the removal of a director, officer, or other person participating in the management of an insured bank because of sanctioned conduct with respect to that bank or any other insured bank.[154] In addition, as a result of the 1982 amendment of the FDIA[155] the regulators are authorized to institute removal proceedings "[w]henever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured bank has committed any violation of the [DIMIA],"[156] without reference to the other elements usually required for removal proceedings.[157]

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[152] See note 145, supra.

[153] 12 U.S.C. § 1818(e)(1). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4)(A), 1730(g)(1), 1786(g)(1).

[154] See id. § 1818(e)(2). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4) (B), 1730(g)(2), 1786(g)(2).

[155] Pub. L. 97-320, § 427(d)(1)(A), 96 Stat. 1525-26 (1982).

If the regulator decides to initiate removal proceedings, a notice must be served on the management offical involved which states the facts constituting the grounds for removal and sets an APA hearing.[158] Upon findings on the record (or upon consent of the noticed parties), an order to suspend or remove will issue.[159] The order generally becomes effective thirty days after service on the director, officer or other persons involved,[160] except to the extent it is stayed, modified, terminated or set aside by the regulator or a reviewing court.[161]

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[156] 12 U.S.C. § 1818(e)(3). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4) (C), 1730(g)(3), 1786(g)(3). The DIMIA, 12 U.S.C. §§ 3201-3207, generally prohibits directors and executive officers from serving in such capacity with more than one depository institution in the same geographical area. See generally 1 Malloy, supra note 1 at 206 - 215.

[157] Cf. text at notes 152-53, supra.

[158] 12 U.S.C. § 1818(e)(5). On the procedures involved in a suspension or removal hearing, see text and accompanying notes 242-44, infra. See also 12 C.F.R. §§ 19.0-19.7, 19.26-19.29 (OCC); §§ 263.1-263.21 (Fed); §§ 308.01-308.22, 308.39-308.46 (FDIC). Normally, the hearing will be scheduled for a date thirty to sixty days after service of the notice, but the director, officer or other person, or the Attorney General, may request that the hearing take place sooner or later than the normal time limits for a removal hearing. See 12 U.S.C. § 1818(e)(5). These APA hearings must take place in the federal judicial district in which the home office of the bank is located. See 1818(h)(1). See also 12 C.F.R. §§ 509.1-509.22 (FHLBB; removal and prohibition proceedings under 12 U.S.C. §§ 1464(d)(4) and 1730(g)); §§ 747.01, 747.101-747.121, 747.501-747.506 (NCUA; suspension and removal actions under 12 U.S.C. § 1786(g)).

[159] 12 U.S.C. § 1818(e)(5). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4) (E), 1730(g)(5), 1786(g)(5). In the case of suspension or removal proceedings initiated by the

The FDIA also provides authority for temporary orders suspending or otherwise prohibiting a director, officer or other person from participation in the management of the bank's affairs, to meet exigencies prior to completion of the suspension or removal proceedings.[162] Persons subject to a temporary order may

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Comptroller, the findings and conclusions of the ALJ who presided at the hearing are certified to the Fed for its determination of whether or not a suspension or removal order should issue. Id. § 1818(e)(5). This curious certification procedure appears to be a congressional attempt to guard against possible abuse of power, since the Office of the Comptroller was the only regulator governed by a single individual, rather than a collegial body. See 1966 U.S. Code Cong. & Ad. News 3539-40.

[160] 12 U.S.C. § 1818(e)(5). See also id. §§ 1464 (d)(4)(E), 1730(g)(5), 1786(g)(5). Consent orders become effective according to their own terms. See, e.g., id. § 1818(e)(5).

[161] See id. § 1818(e)(5). See also id. 1464(d)(4) (E), 1730(g)(5), 1786(g)(5). On judicial review of suspension and removal orders, see id. §§ 1464(d)(7) (B), (8)(A), 1730(j)(2), (k)(2), 1786(j)(2), (k) (1), 1818(h), (i). Federal district courts have been held to be generally without jurisdiction to enjoin removal proceedings. See, e.g., Somerfield v. Federal Deposit Ins. Corp., 609 F. Supp. 128, 130 (E.D.Tenn. 1985).

[162] Id. § 1818(e)(4), which provides in pertinent part as follows:

> [T]he appropriate Federal banking agency may, if it deems it necessary for the protection of the bank or the interests of the depositors, by written notice to such effect served upon such director, officer or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the

apply to the federal district court for a stay of the temporary suspension or prohibition, within ten days of the issuance of the order.[163]

In addition, the FDIA authorizes summary suspen-

> bank. Such suspension or prohibition shall become effective upon service of such notice and, unless stayed by a court . . . , shall remain in effect pending the completion of the administrative proceedings . . . and until such time as the agency shall dismiss the charges specified in such notice, or, if an order of removal or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the bank of which he is director or officer or in the conduct of whose affairs he has participated.

Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4)(D), 1730(g)(4), 1786(g)(4).

[163] See id. § 1818(f), which provides in pertinent part as follows:

> Within ten days after any director, officer, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured bank . . . such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the bank is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person . . . , and such court shall have jurisdiction to stay such suspension and/or prohibition.

Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(4)(F), 1730(g)(6), 1786(g)(6).

sion or removal of any director or officer of an insured bank, or other person participating in its management, whenever charged with the commission of or participation in a felony involving dishonesty or breach of trust.[164] It would appear that this provision is only activated by criminal conduct contemporaneous with the director's or officer's service in that capacity with an insured bank; previous conviction for criminal conduct would not by itself be sufficient.[165] Under this authority, the regulator may suspend, or prohibit management participation by, any such individual by service of written notice, upon the regulator's determination that "continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank. . . ."[166]

As originally enacted in 1966,[167] this provision did not contemplate any hearing for individuals suspended because of felony charges.[168] The provision was successfully attacked as an unconstitutional denial of due process in Feinberg v. FDIC,[169] in light of the fact that it did not even provide for a post-suspension hearing to protect the property interests of the charged individual to vote his stock in favor of his election as a director.

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[164] Id. § 1818(g)(1). Parallel provisions of the statutory authorities of the other regulator are in all material respects identical. See id. §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1).

[165] See Manges v. Camp, 474 F.2d 97 (5th Cir. 1973).

[166] 12 U.S.C. § 1818(g)(1). See also id. §§ 1464 (d)(5)(A), 1730(h)(1), 1786(i)(1).

[167] See Pub. L. No. 89-695, § 202, 80 Stat. 1046-53 (1966).

[168] See 1966 U.S. Code Cong. & Ad. News 3533-34, 3537-39. Cobb has suggested that "hearings were not provided for because of the need for speedy action to avert a run on the deposits of the institution following public awareness of the criminal charges." Cobb, supra at para. 5.01[1][b].

[169] 420 F. Supp. 109 (D.D.C. 1976). Cf. Manges, supra note 165.

With little discussion of these due process implications,[170] Congress amended the provision to provide for a post-suspension hearing.[171] Accordingly, within thirty days of the service of the suspension notice, the charged individual may request a hearing, for the purpose of showing "that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank."[172] The regulator must then set a hearing, generally not later than thirty days after receipt of such a request, either by written submissions or, in the regulator's discretion, by oral testimony, and oral argument.[173] The decision on the hearing must issue within sixty days of the hearing.[174]

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[170] See 1978 U.S. Code Cong. & Ad. News 9290-91.

[171] See Pub. L. No. 95-630, § 111(a)(1), 92 Stat. 3665-66 (1978), requiring an agency determination of the threat to depositors or public confidence, and adding paragraph (3) to 12 U.S.C. § 1818(g). See also 12 C.F.R. §§ 19.0-19.17, 19.30-19.33 (OCC); 263.30-263.34 (Fed); 308.55-308.63 (FDIC). These hearings are not subject to the requirements of the APA. See 12 U.S.C. § 1818(h)(1). See also 12 C.F.R. pt. 509a (FHLBB; suspension, removal and prohibition proceedings under 12 U.S.C. §§ 1464(d)(5), 1730(h)); §§ 747.601-747.611 (NCUA; suspension and prohibition proceedings under 12 U.S.C. § 1786(i)). The constitutionality of this amended provision of the FDIA was upheld in First Nat. Bank of Grayson v. Conover, 715 F.2d 234 (6th Cir. 1983). However, the provision has recently been challenged, with success at the trial court level, in Mallen v. Federal Deposit Insurance Corporation, [Current] Fed. Banking L. Rep. (CCH) para. 86,916 (N.D.Iowa February 17, 1987), prob. juris. noted, --- U.S. --- (1987).

[172] 12 U.S.C. § 1818(g)(3). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(5)(C), 1730(h)(2), 1786(i)(3).

Unless a hearing is requested and results in agency termination of the suspension, the suspension or prohibition will remain in effect until the information, indictment or complaint containing the felony charge is finally disposed of.[175] Once the director, officer or other person is convicted and time for appeal is exhausted, the regulator may issue an order of removal or prohibition, on its determination that "continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank. . . ."[176] However, a finding of not guilty, or other disposition of the criminal charge, does not preclude the regulator from initiating general removal proceedings as previously described.[177] Felony suspension, removal and prohibition orders are subject to judicial review in accordance with the provisions of the FDIA.[178] Subsequent violation of final orders carries criminal sanctions.[179]

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[173] Id. § 1818(g)(3). See also id. §§ 1464(d)(5)(C), 1730(h)(2), 1786(i)(3).

[174] Id. § 1818(g)(3). See also id. §§ 1464(d)(5)(C), 1730(h)(2), 1786(i)(3).

[175] Id. § 1818(g)(1). See also id. §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1).

[176] Id. § 1818(g)(1). See also id. §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1).

[177] Id. § 1818(g)(1). See also id. §§ 1464(d)(5)(A), 1730(h)(1), 1786(i)(1). Cf., e.g., id. § 1818(e)(1)-(4). See also text and accompanying notes 158-63, supra.

[178] See 12 U.S.C. § 1818(h), (i). See also id. §§ 1464(d)(7)(B), (8)(A), 1730(j)(2), (k)(2), 1786(j)(2), (k)(1).

[179] See id. § 1818(j). See also id. §§ 1464(d)(12)(A), 1730(p)(1), 1786(k).

3. Civil money penalties

If an insured bank or any director, officer, employee, agent, or other management participant violates[180] the terms of any final order issued pursuant to the cease and desist or temporary cease and desist authority,[181] the bank or individual "shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which the violation continues."[182] Despite this mandatory statutory language, the FDIA now provides that the penalty "may be assessed and collected by the appropriate Federal banking agency by written notice,"[183] and further provides that the agency "may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed."[184]

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[180] For these purposes, the FDIA indicates that "the term 'violates' includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." Id. § 1818(i)(2)(i). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(j)(2)(A). The civil money penalty authority is available with respect to a past violation, as well as a continuing violation. See Abercrombie v. Office of Comptroller of Currency, 641 F. Supp. 598, 601-602 (S.D.Ind. 1986).

[181] This also applies to violations of an order issued pursuant to id. §§ 1464(d)(16), 1730(s), 1786(q), 1818(s), concerning requirements for recordkeeping and reporting with respect to monetary transactions.

[182] Id. § 1818(i)(2)(i) (emphasis added). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(j)(2)(A).

[183] Id. § 1818(i)(2)(i) (emphasis added). See also id. §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(j)(2)(A).

[184] Id. § 1818(i)(2)(i). See also id. §§ 1464(d)(8)(B)(i), 1730(k)(3)(A), 1786(j)(2)(A).

The formula of "per violation/per day" leaves much room for the operation of the agencies' discretion. The FDIA gives only general, nonquantitative guidance for the use of this discretion. It requires that, in determining the amount of a penalty, the agency "take into account" the following qualitative factors:

> the appropriateness of the penalty with respect to the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.[185]

These guidelines leave a potential for wide variation in determinations from agency to agency, or even from case to case within a given agency. The bank or person who is the subject of a notice of assessment has ten days from the issuance of the notice to request an agency hearing.[186] If no hearing is requested, the order imposing the penalty constitutes a final and unappealable order.[187]

In the case of an order entered after an agency hearing, the exclusive judicial review[188] provided by the FDIA is before the court of appeals for the circuit in which the bank's home office is located, or before the Court of Appeals for the District of Columbia.[189] The bank or individual may obtain review by filing a notice of appeal with the appropriate court of appeals within twenty days of service of the order.[190] The substantial evidence standard[191] is applied in the judicial review of the agency's findings.[192] If the court enters a final judgment in favor of the agency,[193] but the bank or individual fails to pay the the assessment, the agency is required to refer the matter to the attorney general, for recovery of the assessment by action in the appropriate district court.[194] The

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[185] Id. § 1818(i)(2)(ii). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(8)(B)(ii), 1730(k)(3)(B), 1786(j)(2)(B).

[186] Id. § 1818(i)(2)(iii). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(j)(2)(C). The issues are to be determined on the record, per 5 U.S.C. § 554. See 12 U.S.C. § 1818(i)(2)(iii). See also id. §§ 1464(d) (8)(B)(iii), 1730(k)(3)(C), 1786(j)(2)(C).

[187] 12 U.S.C. § 1818(i)(2)(iii). See also id. §§ 1464 (d) (8)(B)(iii), 1730(k)(3)(C), 1786(j)(2)(C). Cf. id. §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(j)(2)(E), 1818(i)(2)(v) (validity and appropriateness of final penalty order not subject to review in district court action by attorney general to collect penalty).

[188] See id. § 1818(i)(2)(iii). See also id. §§ 1464(d)(8)(B)(iii), 1730(k)(3)(C), 1786(j)(2)(C). But

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cf. id. §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(j)(2)(E), 1818(i)(2)(v) (district court action by attorney general to collect penalty).

[189] Id. § 1818(i)(2)(iv). See also id. §§ 1464(d)(8)(B)(iv), 1730(k)(3)(D), 1786(j)(2)(D). See Abercrombie, 641 F. Supp. at 600.

[190] Id. § 1818(i)(2)(iv). A copy of this notice must be sent simultaneously to the agency involved. See id. The agency is required promptly to certify and file with the court the record upon which the penalty was imposed, per 28 U.S.C. § 2112. See 12 U.S.C. § 1818(i)(2)(iv). Parallel provisions of the statutory authorities of the other regulators are in all material respects identical. See id. §§ 1464(d)(8)(B)(iv), 1730(k)(3)(D), 1786(j)(2)(D).

[191] See 5 U.S.C. § 706(2)(E).

[192] 12 U.S.C. § 1818(i)(2)(iv). See also id. §§ 1464(d)(8)(B)(iv), 1730 (k)(3)(D), 1786(j)(2)(D).

[193] This also applies to cases in which a penalty order becomes final as a result of failure of the bank or individual to request an agency hearing. See id. § 1818(i)(2) (v). See also id. §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(j)(2)(E).

[194] Id. § 1818(i)(2)(v). See also id. §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(j)(2)(E). Any penalty collected is covered into the Treasury. Id. § 1818(i)(2)(vii). See also id. §§ 1464(d)(8)(B)(vii), 1730(k)

validity and appropriateness of the underlying order are not subject to judicial review at this stage.[195]

III. REGULATORY IMPLEMENTATION

The regulators are charged with the implementation of essentially identical statutory enforcement authorities. Yet the fact remains that the respective implementing regulations of the regulators manifest some divergences among them. (*See* Illustration 1, *infra*.) These regulations generally share certain shortcomings, however. Procedural provisions for pretrial motion practice tend to be rather unspecific. Provisions governing discovery procedures are likewise uninformative. Little or no guidance is given as to applicable rules of evidence.

For purposes of convenience, the discussion which follows focuses particularly upon the OCC regulations. Consideration is given to the corresponding regulations of the other regulators by way of comparison only.

A. OCC Regulations

Proceedings in any formal hearing are commenced by

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(3)(G), 1786(j)(2)(G).

[195] *Id.* § 1818(i)(2)(v). *See also id.* §§ 1464(d)(8)(B)(v), 1730(k)(3)(E), 1786(j)(2)(E).

Illustration 1

COMPARISON OF AGENCY REGULATIONS

++++++ ++++++	Refer to "General Provisions"
////// //////	No separate provision; refer to "Formal Hearings: Generally Applicable Rules"
\/\/\/ /\/\/\	No corresponding provision

Provision	OCC	Fed	FDIC	FHLBB	NCUA
General Provisions					
General scope of regulations	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	747.01[a]
Generally applicable definitions	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.01	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Rules of construction	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.02	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Formal Hearings: Generally Applicable Rules					
Definitions	19.0	263.2	++++++++++ ++++++++++	509.2	\/\/\/\/\/ /\/\/\/\/\
Authority	\/\/\/\/\/ /\/\/\/\/\	263.1(a)	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Purpose	\/\/\/\/\/ /\/\/\/\/\	263.1(b)	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Scope	19.1	263.1(b)	308.03	509.1	747.101
Commencement: notice and answer	19.2	263.4 263.5	308.05 308.06	509.4 509.5	747.103 747.104
Opportunity for informal settlement	\/\/\/\/\/ /\/\/\/\/\	263.5(e)	308.07(1)	509.5a	747.104(e)
Appearance and practice	19.3	263.3	308.04	509.3, pt. 513	747.102
Failure to appear	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	747.105
Filing and service	19.4	263.16 263.17 263.19	308.19(a) 308.21 308.22(b)	509.17 509.18 509.20(b)	747.116 747.117 747.119(b)

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Form and signature of papers	19.5	263.21	308.19(b)	509.22	747.121
Copies	\/\/\/\/\/ /\/\/\/\/\	263.18	308.19(c)	509.19	747.118
Time (computation and time limits)	19.6	263.19	308.22	509.20	747.119
Briefs	\/\/\/\/\/ /\/\/\/\/\	263.13	308.15	509.13	747.112
Motions	19.7	263.10	308.12	509.10	747.109
Subpoenas	19.8	263.7	308.08	509.7	747.107
Depositions	19.9	263.8	308.09 308.10	509.8	747.107(f)-(h)
Rules of evidence	[19.10(d)[b]]	263.9	308.11	509.9	747.108
Conduct of formal hearing	19.10	263.6	308.07	509.6	747.106
Proposed findings and conclusions, recommended decision	19.11	263.11	308.13	509.11	747.110

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Exceptions to proposed findings and conclusions or recommended decision	19.12	263.12	308.14	509.12	747.111
Oral argument before regulator[c]	19.13	263.14	308.17	509.14	747.113
Notice of submission to regulator[c]	19.14	\/\/\/\/\/ /\/\/\/\/\	308.16	509.15	747.114
Decision of regulator[c]	19.15	263.15	308.18	509.16	747.115
Confidentiality of proceedings or documents	19.16	263.20	308.20	509.21	747.120
Retention of investigative authority	19.17	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Cease and Desist Proceedings					
Scope	19.18	////////// //////////	308.32	////////// //////////	747.301

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Grounds	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.33	\/\/\/\/\/ /\/\/\/\/\	747.302
Notice to state supervisor	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.34	\/\/\/\/\/ /\/\/\/\/\	747.101(c)
Notice of charges and answer	19.19	////////// //////////	308.35	////////// //////////	747.303
Notice of hearing	\/\/\/\/\/ /\/\/\/\/\	////////// //////////	308.35	////////// //////////	747.303
Consent	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.35	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Temporary cease and desist orders	19.20	////////// //////////	308.37	////////// //////////	747.306
Cease and desist orders	19.21	////////// //////////	308.36	////////// //////////	747.304 747.305
Extraterritorial acts of foreign bank or official	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.38	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Removals, Suspensions and Prohibitions[d]					
Scope	19.26	////////// //////////	308.39	////////// //////////	747.501

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Grounds	▩	▩	308.40 308.44	▩	747.502
Notice of intention and answer	19.27	▨	308.42	▨	747.503
Consent	▩	▩	308.42	▩	▩
Suspension or prohibition by notice	19.28	▨	308.45	▨	747.505
Notice to state supervisor	▩	▩	308.41	▩	▩
Removal/prohibition by order	19.29	▨	308.43	▨	747.504
Remainder of board of institution	▩	▩	▩	▩	747.506
Extraterritorial act of official of foreign bank	▩	▩	308.46	▩	▩
Civil Money Penalties					
Purpose	▩	263.22	▩	▩	▩

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Scope	19.22	263.22	308.64	////////// //////////	747.401
Grounds	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.65 308.66 308.67	\/\/\/\/\/ /\/\/\/\/\	747.402
Notice of assessment; request for hearing; answer	19.23	263.23 263.26	308.69	////////// //////////	747.404 747.407
Waiver of hearing	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	308.70	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Hearing order	\/\/\/\/\/ /\/\/\/\/\	263.27	308.71	////////// //////////	747.408
Opportunity for informal hearing	\/\/\/\/\/ /\/\/\/\/\	263.24	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\	\/\/\/\/\/ /\/\/\/\/\
Relevant considerations	\/\/\/\/\/ /\/\/\/\/\	263.25	308.68	\/\/\/\/\/ /\/\/\/\/\	747.403
Notice of hearing	19.24	////////// //////////	308.71	////////// //////////	747.406
Assessment order	19.25	263.28	308.71	////////// //////////	747.408

Illustration 1 -- continued

Provision	OCC	Fed	FDIC	FHLBB	NCUA
Payment of penalty	▨	263.29	308.72	▨	747.405

Notes to Illustration

[a] All references are to 12 C.F.R.

[b] OCC "Hearing rules."

[c] *I.e.*, the Comptroller, the Fed Board of Governors, the FDIC Board of Directors, the FHLBB, or the NCUA Board.

[d] Includes only suspensions, removals and prohibitions subject to APA hearing. For rules concerning summary suspension/removal with respect to criminal charges, see 12 C.F.R. §§ 19.30-19.33 (OCC), 263.30-263.34 (Fed), 308.55-308.63 (FDIC), 747.601-747.611 (NCUA); *id*. pt. 509a (FHLBB).

a notice served upon the party[196] or parties afforded the formal hearing.[197] The notice, like a complaint,

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[196] For purposes of these regulations, the term "party" is defined to mean:

> a bank or person named as a party in any notice which commences proceedings, or any person who is admitted as a party or who has filed a written request and is entitled as of right to be a party. The Comptroller's interested division shall be deemed to be a party. . . .

12 C.F.R. § 19.0(c). In this context, "bank" is defined to mean "a national bank, District [of Columbia] bank, or a foreign bank operating at a Federal branch or agency." Id. § 19.0(a). The "interested division" is defined to mean "those staff members who are engaged in investigative or prosecutorial functions in connection with a [12 C.F.R.] Part 19 proceeding." On the procedural rules applicable to formal investigations, see id. §§ 19.42-19.46.

[197] Id. § 19.2(a). This rule is a procedural requirement generally applicable to all OCC formal hearings. See id. § 19.1. However, the generally applicable procedural rules do not apply to (i) informal hearings with respect to removal where a crime is charged or proven (see id. §§ 19.30-19.33), (ii) exemption hearings under section 12(h) of the Securities Exchange Act of 1934, 15 U.S.C. § 78l(h) (see 12 C.F.R. §§ 19.37-19.41), (iii) informal hearings with respect to corporate activities applications (see id. § 5.11), or (iv) any other informal hearing that might be ordered by the Comptroller. See id. § 19.1 (scope of generally applicable procedural rules).

Depending on the particular type of formal enforcement action, the "notice" itself may be (i) a notice of charges, in a cease and desist proceeding (see id. § 19.19), (ii) a notice of assessment, in a civil money penalty proceeding (see id § 19.23), or (iii) a notice of intention to remove, in a removal proceeding (see id. § 19.27). Id. § 19.2(a).

It should be noted that the bank regulators do not includes allegations of fact and law pertinent to the

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generally follow the adminstrative enforcement practice of the Securities and Exchange Commission ("SEC"), see Sec. Ex. Act Rel. No. 9796, CCH Fed. Sec. L. Rep. para. 97,010 (September 27, 1972), of providing an enforcement target with an opportunity to make a formal written presentation to the SEC at the time the SEC staff recommends injunctive action. See, e.g., Conversation with Ronald Glancz, Assistant General Counsel (Open Bank & Corporate Litigation), FDIC (November 10, 1987). But cf. 12 C.F.R. § 263.24 (Fed rules; opportunity for "informal proceeding" in civil money penalty cases). The advisory Wells Committee had recommended to the SEC that this practice be made mandatory in all cases by formal rule, see Report of the Advisory Committee on Enforcement Policies and Practices (June 1, 1972), summarized in CCH Fed. Sec. L. Rep. para. 79,266 (June 29, 1972), but the SEC has not adopted that recommendation. See R. W. Jennings & H. Marsh, Securities Regulation 1528 (6th ed. 1987). See generally Securities and Exchange Commission v. National Student Marketing Corp., 538 F.2d 404 (D.C.Cir. 1976), cert. denied, 429 U.S. 1073 (1977).

The utility of such a procedure for bank enforcement actions, which tend to be purely informal, confidential and administrative, is doubtful. Arising typically out of the examination and supervision context, the process of bank enforcement provides many informal opportunities for exchanges of views throughout. See, e.g., OCC, The Director's Book 70-71 (1987). Indeed, before anything as formal as an administrative enforcement action were decided upon, a bank and its directors would generally be given an opportunity to meet with regulatory personnel and discuss alternatives. See, e.g., id. at 71.

Accordingly, this study makes no recommendation with respect to the adoption of a practice analogous to the SEC Wells submission. It is the view of this writer that introduction of such a practice would be of limited utility and might well disturb the balance of the overall context of bank regulatory enforcement, which counterpoises the need for swift, flexible regulatory responses, ideally taken at a very early stage, against the interests of banks and their particular type of formal enforcement proceeding being undertaken.[198] However, the regulations indicate that

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insiders in due process in those relatively few cases where an accommodation cannot be reached. In such cases, it should be noted, the next step is a confidential APA hearing, at which time the views of the bank or other target would be fully aired in any event, and not limited to a written submission.

[198] _See_ _id_. §§ 19.19 ("specify the violations or practices being complained of"), 19.23 ("statement of the facts constituting the alleged violation"), 19.27 (state the grounds for removal or prohibition). _Cf_. _id_. § 19.2(a).

The notice will also specify the hearing date. In the case of cease and desist proceedings, this generally must be a date 30 to 60 days after service of the notice. _See_ _id_. § 19.19. The notice of charges is also the stage at which a temporary cease and desist order, if any, would likely come into play. _See_ _id_. § 19.20 (violation or practice specified in notice likely to cause insolvency or substantial dissipation of assets or earnings, weaken condition of bank, or prejudice interest of depositors). The temporary cease and desist order, like a temporary restraining order, is intended to maintain the situation in dispute "prior to completion of administrative proceedings." _Id_. However, the temporary cease and desist order is issued not pursuant to a hearing, but on the Comptroller's own determination, and it is effective upon service. _Id_. It remains effective and enforceable "pending the completion of the administrative proceedings and until the Comptroller dismisses the charges, or if a cease-and-desist order is issued . . . , until the effective date of any such order." _Id_.

In the civil money penalty context, two notices are contemplated. the notice of assessment includes the alleged violation and the amount being assessed. _Id_. § 19.23. The party being assessed has ten days from service to request a hearing. _Id_. If no hearing is requested within the requisite period, the assessment order becomes a final and unappealable order. _Id_. If a hearing is requested, a separate notice of hearing is issued which specifies a date at least thirty days "[t]he matters of fact and law alleged in a notice may be amended by the Comptroller at any stage of the proceedings, and such amended notice *may* require an answer from the party or parties served and *may* set a new hearing date."[199] The rules do not require any motion for leave to amend in this regard, nor do they on their own terms specify the limits of this authority or the scope of the Comptroller's discretion in this regard.[200]

In the absence of consent to the order by the party served with a notice,[201] the party generally must

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after the issuance of the notice. *Id.* § 19.24.

In the suspension and removal context, the notice of intention to remove from office, or to prohibit the individual from participation in the affairs of a bank, generally must fix a time and place for the hearing, within a period of 30 to 60 days after service. *Id.* § 19.27. As with temporary cease and desist orders, in the removal context the Comptroller may also issue a notice suspending or prohibiting participation by an individual pending administrative removal proceedings. *Id.* § 19.28. *See also id.* § 19.26. This suspension or prohibition by notice is effective upon service and generally remains in effect "until the charges are dismissed and the administrative proceedings are completed, or until the effective date of any final order of removal or prohibition." *Id.* § 19.26.

[199] *Id.* § 19.2(a) (emphasis added).

[200] The rules do provide that an answer to a subsequent notice containing amended allegations generally must be filed within twenty days of service of the amended notice. *Id.* § 19.2(b).

[201] It should be noted, however, that consent, particularly in the cease and desist context, has been the norm.

file[202] an answer within twenty days[203] after service[204] of the notice.[205] The answer must specifically admit or deny each allegation of the notice[206] and must "concisely state any defenses."[207]

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[202] On the formal requirements of filing, see id. § 19.4(a). On the formal requirements with respect to the form and requisite signature of filings, see id. § 19.5.

[203] On the rules for calculation of time in this regard, see id. § 19.6(a). The ALJ has the authority to extend time limits or approve stipulations of the parties changing the time limits. Id. § 19.6(b). Both before the ALJ is appointed and after the ALJ's recommended decision has been filed, the Comptroller may exercise authority to grant extensions of time. See id.

[204] On the formal requirements of service and proof of service, see id. § 19.4(b)-(c).

[205] Id. § 19.2(b). Failure to file a timely answer constitutes a waiver of of the right to appear and contest the allegations of the notice. See id. § 19.2 (d). Under these circumstances, the ALJ would be authorized to find the facts as alleged and to file a recommended decision. Id. However, the rules also provide that either the Comptroller or the ALJ may for good cause shown permit the filing of a delayed answer. Id.

Cf. id. § 19.19 (cease and desist proceedings; notice of charges and answer), which provides in pertinent part as follows: "Any party . . . who does not appear personally or by a duly authorized representative shall be deemed to have consented to the issuance of a cease-and-desist order." An identical rule applies in the civil money penalty context, see id. § 19.24, and removal context. See id. § 19.27.

[206] Any allegation which is not specifically denied in the answer is deemed to be admitted. See id. § 19.2(c).

[207] Id. The rules do not specifically indicate what the effect would be of a failure to state defenses

The party has the right to be represented in the proceedings by an attorney[208] or other duly authorized representative.[209] Attorneys and other representatives are required to file a notice of appearance[210] and are generally subject to the discipline of the Comptroller or ALJ in the course of the proceeding.[211]

As a practical matter, much of the practice in formal procedures is essentially motion practice,[212] and as a result the procedural provisions with respect to motions are of particular importance.[213] In this

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in the answer as required by this provision.

[208] See id. § 19.3(a). On limitations on multiple representation of parties, see id. § 19.3(b).

[209] Id. § 19.3(a), which provides in pertinent part as follows:

> Any . . . person [other than an authorized attorney who is a member in good standing of the bar] desiring to act in a representative capacity may be required to file a power of attorney showing authority to act in such capacity and to show to the satisfaction of the Comptroller the possession of the requisite qualifications.

[210] See id.

[211] See id. § 19.3(c).

[212] Interview with Richard V. Fitzgerald, Chief Counsel, OCC, April 17, 1987. Cf. Interview with Robert M. Fenner, General Counsel, NCUA, June 11, 1987. On a related issue, the Comptroller's rules specifically provide for and encourage the practice of prehearing conferences and memoranda, intended to expedite the proceedings. See 12 C.F.R. § 19.10(b). Any agreement reached among the parties as a result become part of the record and are generally binding on the parties. Id.

[213] However, the ALJ does not have the authority under the rules to decide a motion to dismiss or any other motion "which would result in a final determina-

regard, the rules are rather sparse. Except when made during a hearing session, applications or requests for an order or ruling must be made by written motion supported by a memorandum consisely stating the grounds of the motion.[214] Generally within five days of service of the motion,[215] any party to the proceedings may file a memorandum in opposition.[216] Oral arguments are not provided for under the rules, except as granted by the Comptroller or the ALJ.[217] All such orders and rulings on motions become part of the record.[218] Interlocutory review by the Comptroller of an ALJ ruling is possible, but only on the ALJ's certification on a party's request and showing of good cause.[219]

The ALJ has the authority to issue subpoenas, on written application of a party and a showing of "general relevance and reasonable scope of the testimony or other evidence sought."[220] Conversely, the ALJ may make a determination that the requested subpoena may be unreasonable, oppressive, excessive in scope, or unduly

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tion of the merits of the proceedings." 12 C.F.R. § 19.10.

[214] 12 C.F.R. § 19.7(a).

[215] On service, see note 204, _supra_.

[216] 12 C.F.R. § 19.7(b). The movant does not have a right of reply, except as permitted by the ruling authority (_e.g._, the Comptroller or the ALJ, _per_ _id_. § 19.7(c)). _See_ _id_. § 19.7(b).

[217] _Id_. § 19.7(b).

[218] _Id_. § 19.7(d). _Cf_. _id_. §§ 19.4(a) (filings), 19.10(e) (transcript of formal hearing).

[219] _Id_. § 19.7(d).

[220] _Id_. § 19.8(a). During hearing sessions, application for a subpoena may be made orally on the record. _Id_. On service of subpoenas and attendance of witnesses, see _id_. § 19.8(c)-(d). On motions to quash a subpoena, see _id_. § 19.8(b).

burdensome,[221] in which case the application may be denied or granted on conditions "as fairness requires."[222]

Aside from general provisions for depositions,[223] the rules do not address the specific questions of the scope of or procedures for discovery. Furthermore, while the rules do speak to general questions of evidence,[224] they do not provide any guidance as to applicable rules of evidence, or, for that matter, as to specific rules of procedure in connection with the conduct of formal hearings.[225] The absence of such specific guidance clearly results in the potential for inconsistent practice from case to case on specific procedural and evidentiary issues.[226]

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[221] _Id_. § 19.8(a). The rules provide that, in reaching this determination, the ALJ has the discretionary authority to

> inquire of other parties to the proceeding whether they will concede the facts sought to be proved. Such inquiry shall not disclose the identity of the person sought to be subpoenaed except with permission of the party requesting the subpoena.

_Id_. In contrast, the procedures for application to take a deposition and for subpoenas in connection therewith provides for service of the application on the other parties and notice of the issuance of such a subpoena to them. _Id_. § 19.9(a)-(b). The procedural requirements for an application and notice may be waived by agreement among the parties. _Id_. § 19.9(c).

[222] _Id_. § 19.8(a).

[223] _See_ _id_. § 19.9(d)-(e).

[224] _See_ _id_. §§ 19.9(e) (introduction of depositions as evidence), 19.10(d) (hearing rules; exclusion of irrelevant or unduly repetitious evidence, objections).

[225] _But_ _cf_. _id_. § 19.10(d) (general hearing rules).

[226] This potential problem may be heightened by the fact that ALJs presiding over formal hearings are drawn

At the conclusion of a formal hearing, however conducted, the official reporter is required to certify the transcript of the hearing.[227] The transcript, together with all exhibits received in evidence, is then filed,[228] with copies furnished to the ALJ and the interested OCC division.[229] Within thirty days of this filing, any party to the proceedings is permitted to file proposed findings of fact and conclusions of law.[230] Within thirty days of the expiration of this time period, the ALJ is required to file a recommended decision and findings of fact and conclusions of law.[231] Copies of this filing are required to be served promptly on the parties to the proceedings.[232]

Within fifteen days of service of the copy of the

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from various other agencies and may have differing perspectives or experience. _See_ Interview with Mr. Fitzgerald, _supra_ note 212; Interview with Mr. Fenner, _supra_ note 212; Interview with Douglas Jones, Office of the General Counsel, FDIC, May 27, 1987. _But_ _cf_. text and accompanying notes 507-10. The regulators are not unaware of the shortcomings of the current procedural rules for formal hearings. The OCC and the FDIC have already begun an internal review of these rules, with a view to their substantial revision. Interview with Richard V. Fitzgerald, Chief Counsel, OCC, June 10, 1987; Interview with Mr. Jones, _supra_.

[227] 12 C.F.R. § 19.10(e).

[228] _See_ note 202, _supra_. Parties to the proceedings are required to be notified of this filing. 12 C.F.R. § 19.10(e).

[229] 12 C.F.R. § 19.10(e). Copies are made available to the other party or parties to the proceeding upon payment of the cost thereof. _Id_.

[230] _Id_. § 19.11(a).

[231] _Id_. § 19.11(b). Additional time for this filing may be permitted by the Comptroller on a showing of good cause. _Id_.

[232] _Id_.

filing, a party may file exceptions to the recommended decision, findings and conclusions, or to any failure to adopt a proposed finding or conclusion.[233] Within this fifteen-day period, at the written request of any party, or upon his own initiative, the Comptroller may order and hear oral argument on the recommended decision, findings and conclusions.[234]

Thereafter the case is submitted to the Comptroller for final decision, and the parties are so notified.[235] Copies of the Comptroller's decision and order in the case must be served upon the parties.[236]

In the cease and desist context, the Comptroller may issue and serve upon a bank or individual an order to cease and desist a violation or practice, pursuant to either consent of the parties or the Comptroller's appropriate findings on the record filed by the ALJ.[237] The order is effective thirty days after service, except in the case of consent orders, which are effective as of whatever time specified in the order itself.[238] The orders tend to be crafted quite specifically around the particular circumstances of the violations or unsafe and unsound practices alleged and found. In general, the orders tend either to mandate specified corrective action on the part of the bank or individuals or to prohibit the continuation of specified acts or both.[239]

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[233] Id. § 19.12.

[234] Id. § 19.13.

[235] Id. § 19.14. In considering the case and reaching a decision, the Comptroller may be advised and assisted by "[s]taff who have not engaged in the performance of investigative or prosecutorial functions in the case." Id. § 19.15.

[236] Id. § 19.15. In the cease and desist context, issuance of the Comptroller's final order will affect the continuing effectiveness of any temporary cease and desist order issued in the course of the proceedings. See note 198, supra.

[237] Id. § 19.21.

[238] Id.

In the civil money penalty context, the Comptroller may issue and serve upon a bank or individual an order of assessment of penalty, pursuant to either consent of the parties or the Comptroller's appropriate findings on the record filed by the ALJ.[240] The order is effective immediately upon service, except as otherwise specified in the order itself.[241]

In the context of removal proceedings with respect to national bank directors, officers and other individuals participating in a national bank's affairs, the findings and conclusions on the record are certified by the Comptroller to the Fed for its determination of whether any final order of removal or prohibition should be issued.[242] The Fed may issue such an order, either upon the consent of the parties or its finding that the charges have been established.[243] The order is effective thirty days after service, except in the case of consent orders, which are effective as of whatever time specified in the order itself.[244]

These procedural rules were promulgated primarily on the rulemaking authority granted under FDIA section 8(n).[245] The OCC has also utilized this rulemaking authority to promulgate regulations identifying certain types of activities that it deems to be unsafe or unsound practices. The scope of this authority has been subjected to challenge in litigation.

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[239] See id., which provides in pertinent part as follows:

> Such order may . . . require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of the bank to cease and desist from [any violation or practice] and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

[240] Id. § 19.25.

[241] Id.

[242] Id. § 19.26.

[243] Id. § 19.29.

[244] Id.

A case in point is presented by the OCC regulations concerning credit life insurance sold to borrowers of national banks.[246] In promulgating the regulations, the Comptroller specifically relied upon,[247] *inter alia*, the power to make rules and regulations conferred upon the agencies by FDIA section 8(n).[248]

The Independent Bankers Association of America ("IBAA") challenged these regulations as exceeding the Comptroller's authority in that regard.[249] In effect, the problem here was that the agency was creating substantive rules of conduct based in part upon statutory authority which might reasonably be read to be concerned only with procedural rules.[250]

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[245] *See* 44 Fed. Reg. 19,376 (1979). *See also* 12 U.S.C. § 1818(n):

> In the course of or in connection with any proceeding under [12 U.S.C. § 1818], . . . the agency conducting the proceeding . . . is empowered to make rules and regulations with respect to any such proceedings. . . .

[246] *See* 42 Fed. Reg. 48,518 (1977), *as amended*, 12 C.F.R. pt. 2 (1987). For other examples of this use of interpretive rulemaking authority, see 12 C.F.R. § 7.8000(b) (safety and soundness of service charges); *id*. pt. 337 (FDIC; unsafe and unsound banking practices); *id*. § 563g.10 (FHLBB; unsafe or unsound practices in connection with securities offerings). *Cf*. *id*. § 250.103(d)(2) (Fed; proposed dividends, danger to bank's capital structure).

[247] *See* 42 Fed. Reg. at 48,523-24.

[248] *See* note 245, *supra*.

[249] *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C.Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

The Comptroller argued that receipt by bank insiders of personal commissions from credit life insurance sales, which was prohibited by the regulations,[251] could stimulate overselling and result in an unsound form of self-dealing.[252] The court noted that under the rulemaking authority the Comptroller was "empowered to make rules and regulations" with respect to any proceeding initiated pursuant to FDIA section 8. Preferring to read this grant of authority broadly, the court expanded on this theme as follows:

> There is little room for doubt, however, that the Comptroller is proceeding as Congress contemplated. National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice. The Comptroller's statutory duties require the closest monitoring and continuous supervision of these institutions. Thus, the Comptroller's discretionary authority to define and eliminate "unsafe and unsound" conduct is to be liberally construed.[253]

To similar effect is First Nat. Bank of Lamarque v. Smith,[254] involving a challenge to previous informal directives of the Comptroller restricting credit life insurance activities.[255] In upholding the Comptroller's authority to issue such a directive, the Fifth Circuit accepted the proposition that "the payment to and retention by loan officers of commissions derived from the sale of credit life insurance involves an inherent conflict of interest."[256] In the court's view, the directives "represented an attempt . . . to minimize conflicts of interest, self-dealing, and unsafe and unsound banking practices among national banks"[257] and were therefore within the legitimate authority of the Comptroller under FDIA section 8.

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[250] See note 245, supra.

[251] See 12 C.F.R. §§ 2.2(b)(1), 2.4(a).

[252] See Independent Bankers Ass'n, 613 F.2d at 1168.

[253] Id. at 1168-69.

[254] 610 F.2d 1258 (5th Cir. 1980).

[255] See id. at 1260-61 & nn. 3, 4.

What happens as a result of this liberal construction of the section 8(n) rulemaking authority is worth noting. In a sense, the determination of the unsafe and unsound quality of an identified practice is removed from the context of an administrative proceeding against a particular bank for a particular activity. The narrow question in any subsequent cease and desist proceeding becomes whether or not the bank or an insider "is violating or has violated, or . . . is about to violate, a . . . rule or regulation,"[258] rather than the underlying question of whether or not the bank or an insider "is engaging or has engaged . . . or is about to engage, in an unsafe or unsound practice."[259] It may be argued that cases like Independent Bankers Association, in answering the broad question of statutory authority, answer the underlying question generically for all such cease and desist proceedings.

B. Fed Regulations

The Fed's procedural rules are based upon a broad range of statutory authority[260] and a diverse assortment of adjudicatory contexts.[261] For present purposes, the focus is upon the Fed's implementation of the enforcment authorities granted by FDIA section 8. While many of the Fed's rules in this regard are relatively more elaborate than those of the Comptroller, overall they are more abbreviated in structure.

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[256] First Nat. Bank of Lamarque, 610 F.2d at 1265.

[257] Id.

[258] 12 U.S.C. § 1818(b)(1).

[259] Id.

[260] See 12 C.F.R. §§ 262.4, 263.1(a). In addition to the FDIA, 12 U.S.C. §§ 1817(j), 1818(n), authority in this regard includes (i) the Federal Reserve Act, id. §§ 248(i), 504, 505; (ii) the Bank Holding Company Act of 1956, as amended, id. §§ 1844(b), 1847(b); (iii) the anti-tying provisions, id. § 1972(2)(F); (iv) the International Banking Act of 1978, id. § 3108; and, (v)

Proceedings in an APA hearing are initiated by issuance of a notice to the parties.[262] Generally, an answer to the notice is required to be filed within twenty days of service.[263] Rules similar to those of the OCC regulations apply as to required admissions and denials in the answer.[264] The Fed rules are relatively more specific and detailed than the OCC regulations as to such matters as the conduct of the hearings and the authority of the presiding officer,[265] and pre-hearing

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the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78o-4.

[261] See 12 C.F.R. § 263.1(b). In addition to the adjudicatory context of FDIA section 8, 12 U.S.C. § 1818, these include: (i) suspension of member banks from use of Fed credit facilities, per id. § 301; (ii) termination of Fed membership, per id. § 327; (iii) change in control disapprovals, per id. § 1817(j); (iv) merger applications, per id. § 1828(c); (v) holding company adjudications per id. §§ 1841-1843; (vi) holding company divestiture orders, per id. § 1844(e); (vii) antitrust cease and desist proceedings, per 15 U.S.C. § 21; (viii) municipal securities dealer sanctions, per id. § 78o-4; and, (ix) civil money penalty assessments under a variety of statutory authorities. See 12 C.F.R. § 263.1(b)(10).

[262] See 12 C.F.R. § 263.4.

[263] Id. § 263.5(a).

[264] See id. § 263.5(b)-(d). Cf. text and accompanying notes 201-07, supra.

[265] See 12 C.F.R. § 263.6(a)-(b). See also id. § 263.6(g), (h) (further evidence; ex parte communications).

practice.[266] However, the Fed rules are nevertheless rather unspecific on rules of discovery.[267]

In the civil money penalty context, proceedings are initiated by the issuance of a notice of assessment.[268] Among other things, the notice must indicate the time limit within which a request for a formal hearing must be made.[269] If a request is made in a timely fashion, an order for a hearing, to commence within thirty days of the date of the order, is issued.[270]

Upon consent to the notice of assessment[271] or appropriate finding by the Fed on a hearing record that the grounds of the notice have been established, the Fed may issue an order of assessment.[272] This order is generally effective upon issuance.[273]

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[266] See id. §§ 263.5(e), 263.6(c). See also id. §§ 263.8 (depositions), 263.10 (motions).

[267] But cf. id. §§ 263(c)(4) (prehearing conference; disclosure of witnesses), 263.8 (depositions).

[268] Id. § 263.23. The Fed rules recite the statutory considerations to be taken into account in determining the amount of the penalty. See id. § 263.25. Cf. text at note 185, supra. The Fed rules also provide for an opportunity for an informal proceeding, prior to the issuance of the formal notice. See 12 C.F.R. § 263.24.

[269] Id. § 263.23(f). See also id. § 263.26. Failure to request a hearing in a timely fashion constitutes a waiver, "and the notice of assessment shall constitute a final and unappealable assessment order." Id. See also id. § 263.28(a).

[270] Id. 263.27.

[271] Consent in this context would include constructive consent from failure of the assessed party to appear at a hearing. See id. § 263.28(a).

[272] Id.

C. FDIC Regulations

As with the Fed regulations, the FDIC general rules for APA hearings cover a wide range of statutory authorities.[274] For present purposes, the focus is upon the FDIC's implementation of the enforcment authorities granted by FDIA section 8.

In this regard, the FDIC rules are essentially similar to those of the Fed.[275] The rules do give relatively specific guidance as to the conduct of hearings[276] and pre-hearing practice.[277] Nevertheless, the rules are characteristically thin on such matters as rules of evidence and discovery.[278]

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[273] *Id.* § 263.28(b). However, the notice of assessment will normally designate a date for payment of the penalty 60 days from the issuance of the notice. *Id.* § 263.29(a).

[274] *See id.* § 308.03. *See also id.* §§ 308.23-308.31 (termination of deposit insurance), 308.47-308.54 (special examinations), 308.73-308.77 (change in control; disapprovals), 308.78-308.83 (same; civil penalties), 308.84-308.89 (municipal securities dealer sanctions), 308.90-308.95 (exemption proceedings, *per* 15 U.S.C. § 78*l*(h)).

[275] *See generally id.* §§ 308.04-308.22 (generally applicable procedural rules), 308.32-308.38 (cease and desist proceedings), 308.39-308.46 (suspension and removal), 308.55-308.63 (suspension and removal; felony charges), 308.64-308.72 (civil money penalties).

[276] *See id.* § 308.07(b).

[277] *See id.* 308.07(e) (prehearing conferences). *Cf. id.* §§ 308.08 (subpoenas), 308.09 (depositions), 308.12 (motions).

[278] *But cf. id.* §§ 308.07(b)(10), 308.09, 308.11.

D. FHLBB Regulations

Formal adjudications, whether arising under the authority of section 5(d) of the HOLA[279] or section 407 of the NHA,[280] are governed by a unified, but rather abbreviated, set of procedural provisions promulgated by the FHLBB.[281] As with the Fed and FDIC regulations, the FHLBB's general rules for formal hearings cover a wide range of statutory authorities.[282] For present purposes, the focus is upon the FHLBB's implementation of the enforcment authorities granted by HOLA section 5(d) or NHA section 407.

In this regard, the FHLBB rules are essentially similar to those of the banking agencies.[283] Accordingly, they give relatively specific guidance as to the conduct of hearings[284] and pre-hearing practice.[285] However, as with those of the other agencies, the FHLBB rules are relatively unspecific on such matters as rules of evidence and discovery.

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[279] 12 U.S.C. § 1464(d).

[280] Id. § 1730.

[281] See 12 C.F.R. pt. 509. However, informal adjudications in connection with the removal, suspension or prohibition of a director, officer or other person participating in an institution's affairs, where a crime is charged or proven, per 12 U.S.C. §§ 1464(d)(5), 1730(h), are subject to the procedures of a separate part of the FHLBB regulations. See 12 C.F.R. pt. 509a.

[282] See id. §509.1. Aside from cease and desist, suspension and removal and related civil money penalty authorities, the statutory authorities in this regard include: (i) removal of an FHLB-member institution from membership, per 12 U.S.C. § 1426(i); (ii) depriving any nonmember borrower of FHLB advances, per id.; (iii) termination of deposit insurance, per id. § 1730(b); controlling influence determinations, per id. § 1730(a)(2)(D); (iv) change in control determinations, per id. § 1730(q)(4); (v) holding company termination proceedings, per id. § 1730a(h)(5)(A); and, (vi) holding company civil penalty, per id. § 1730a(j)(4)(C).

[283] See generally 12 C.F.R. §§ 509.2-509.22.

E. NCUA Regulations

As with the Fed and FDIC regulations, the NCUA rules for APA hearings cover a wide range of statutory authorities.[286] For present purposes, the focus is upon the NCUA's implementation of the formal enforcement authorities granted by FCUA section 206.[287]

In this regard, the NCUA rules are essentially similar to those of the FDIC, rather than following the relatively more abbreviated pattern of those of the Fed or the FHLBB. Thus, the rules give relatively specific guidance as to the conduct of hearings[288] and pre-hearing practice.[289] There are also provisions for notice to interested state authorities with respect to state-chartered credit unions that are to be the subject of formal enforcement actions, to allow for corrective action by the state authorities before the institution of proceedings by the NCUA.[290]

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[284] See id. § 509.6.

[285] See id. §§ 509.5a (informl settlements), 509.6 (b) (prehearing conferences), 509.8 (depositions), 509.10 (motions).

[286] See id. § 747.101(a) (scope of procedural rules). Aside from cease and desist, suspension and removal and related civil money penalty authorities granted under FCUA section 206, 12 U.S.C. § 1786, the statutory authorities in this regard include: (i) charter suspension or revocation, per id. § 1766; (ii) termination of deposit insurance, per id. § 1786(b); and, (iii) termination of membership in the NCUA Central Liquidity Facility, per id. § 1795c(e)(3).

[287] 12 U.S.C. § 1786.

[288] See 12 C.F.R. § 747.106.

[289] See id. §§ 747.104(e) (informal settlements), 747.106(c) (prehearing conferences), 747.107(e)-(h) (depositions), 747.109 (motions).

IV. JUDICIAL INTERPRETATIONS

While it is clear that the federal judiciary is cognizant of the expertise of the federal regulators,[291] in the area of bank regulatory enforcement the courts appear to have taken their review role quite seriously.[292] In this regard, the statutory framework authorizing bank regulatory enforcement actions provides an integral, if limited, role for judicial review in the enforcement area.[293]

This section first considers the standard of judicial review applicable to formal enforcement actions.[294] The section then examines the results of judicial decisions concerning a range of interpretive issues raised by these enforcement actions.[295]

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[290] Id. § 747.101(c). The corrective action must be taken by the state authorities "within such time as the [NCUA] Board deems appropriate in light of the circumstances of the case" as specified in the notice to the state authorities. Id. In addition, the regulations expressly provide that this requirement is not available to the credit union or individual subject to a notice or order as a ground for attacking the validity of the notice or order. See id.

[291] For a compelling discussion of the extent to which the judiciary has deferred to the regulators in light of this cognizance, specifically in the chartering area, see Scott, In Quest of Reason: Licensing Decisions of the Federal Banking Agencies, 42 U. Chi. L. Rev. 235, 268 (1975).

[292] See, e.g., text and accompanying notes 301-27, infra.

[293] See, e.g., text and accompanying note 150, supra.

[294] See text and accompanying notes 296-338, infra.

[295] See text and accompanying notes 339-475, infra.

A. Standard of Judicial Review

In First Nat'l Bank of Eden v. Dept. of Treasury,[296] the court relied upon the APA in determining that its review of the Comptroller's findings with respect to a cease and desist order was limited to the question of whether or not the findings were supported by substantial evidence on the record as a whole.[297] Moreover, having determined that there was such supporting evidence,[298] the court took the position that, in light of the Comptroller's expertise and discretion in this area, his decision as to the appropriate corrective action to be taken was not to be disturbed unless it was shown to be arbitrary or capricious.[299] The court therefore concluded that the order was a valid exercise of the Comptroller's authority and that no abuse of discretion had occurred.[300]

While the federal regulators have been granted significant authority in the enforcement area and are usually accorded a high degree of judicial deference, the case law indicates that this deference is far from uncritical. First National Bank of Bellaire v. Comptroller of the Currency,[301] involving a challenge to an OCC determination that the bank's capital position involved unsafe and unsound practices, is illustrative in this regard. Although acknowledging the wide latitude afforded the Comptroller, the court held that "the Comptroller must be able to articulate a correlation between the action taken and the reason given for the action. Reasons which are in substance mere rhetoric are not sufficient and indicate arbitrary action."[302] The Bellaire court reasoned:

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[296] 568 F.2d 610 (8th Cir. 1978).

[297] 568 F.2d at 611. See also Bank of Dixie v. FDIC, 766 F.2d 175 (5th Cir. 1985) (FDIC determination of unsafe and unsound practices supported by substantial evidence).

[298] First Nat'l Bank of Eden, 568 F.2d at 611. Cf. Larimore v. Conover, 775 F.2d 890, 895 (7th Cir. 1985), reversed en banc, 789 F.2d 1244 (1986) (lack of statutory authority).

[299] Id. at 611-12. See Dakota Nat. Bank & Trust Co. v. First Nat. Bank & Trust Co., 554 F.2d 345, 350-51 (8th Cir.), cert. denied, 434 U.S. 877 (1977); Larimore, 775 F.2d at 895-96.

[300] First Nat'l Bank of Eden, 568 F.2d at 611.

[301] 697 F.2d 674 (5th Cir. 1983).

> In reviewing the Comptroller's findings we must not substitute our judgment for that of the Comptroller. This Court must determine if the Comptroller made a reasonable finding, not whether it [sic] made a correct finding. The findings are unreasonable if there is no rational connection between the evidence as a whole and the findings.[303]

Addressing the appropriate standard of judicial review, the court explained the two-stage process to be applied in reviewing bank regulatory enforcement action:

> Judicial review of statutory cease and desist orders is a two-part process. First the court must satisfy itself that there is substantial evidence to support the order. Next the court must test the remedy against the arbitrary and capricious standard.[304]

Two decisions by the Eighth Circuit, involving a cease and desist order issued by the FDIC against an insured state nonmember bank, also illustrate the application of the APA in assessing the adequacy of the agency's procedures. The decisions concerned a cease and desist order arising out of violations of the Truth in Lending Act ("TILA")[305] and the Fed's Regulation

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[302] Id. at 680.

[303] Id. at 685 (citations omitted).

[304] Id. at 686, citing Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889 (5th Cir. 1978).

[305] 15 U.S.C. §§ 1601 et seq.

Z,[306] implementing TILA.

In Citizens State Bank of Marshfield, Mo. v. FDIC ("Marshfield I"),[307] the court remanded to the FDIC for further consideration of the Regulation Z matters, after concluding that the FDIC had not sufficiently articulated its reasons and basis for its order.[308] In its second decision, Marshfield II,[309] after remand, the court concluded that the FDIC had adequately corrected the deficiencies noted in Marshfield I.[310] However, the Marshfield II court went on to hold that the order was arbitrary and capricious insofar as it related to conduct that had once constituted a technical violation of TILA, but which had subsequently become lawful under the 1980 amendments to TILA.[311]

In setting aside the cease and desist order, the court reasoned:

> Common sense and fairness dictate that Citizens Bank not be exposed to such liability on the basis of practices, now lawful, which once constituted technical violations of legislation that Congress has amended expressly because of its concern with imposing penalties for disclosure errors such as many of those before us.[312]

To similar effect is Anonymous v. FDIC,[313] in which the court remanded to the FDIC because of the agency's failure to provide a statement of reasons sufficiently detailed to permit the court to review the FDIC's exercise of its discretion in the administrative proceeding.[314] The FDIC had instituted an action pursuant to section 8(e) of the FDIA[315] to suspend and remove a bank director. In response, the director brought an action, pursuant to section 8(f),[316] seeking a temporary restraining order and a stay of the suspension order.[317]

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[306] 12 C.F.R. pt. 226.

[307] 718 F.2d 1440 (8th Cir. 1983).

[308] See id. at 1444.

[309] 751 F.2d 209 (8th Cir. 1984).

[310] See id. at 214.

[311] Id. at 214-15 & nn. 6-8.

[312] Id. at 216.

[313] 617 F. Supp. 509 (D.D.C. 1985).

The court noted that the FDIC had provided neither its employees nor the courts any guidance as to the use of the agency's suspension and removal powers under section 8(e)(4) of the FDIA.[318] Rejecting the FDIC's argument that the section provides the agency with "unfettered discretion" on the basis of its regulatory expertise,[319] the court emphasized that:

> One of the most elementary principles of judicial review of discretionary agency action is that the agency must provide a statement of reasons that is sufficently detailed to permit a reviewing court to determine whether that discretion was exercised properly.[320]

In Anonymous, the evidence considered by the FDIC consisted largely of untested affidavits by the respective parties. Consequently, the court held, the plaintiff director satisfied the traditional criteria for preliminary injunctive relief under the circumstances.[321]

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[314] See id. at 514.

[315] 12 U.S.C. § 1818(e).

[316] Id. § 1818(f).

[317] Anonymous, 617 F. Supp. at 511.

[318] See id. at 513-14.

[319] Id. at 514.

[320] Id. (citations omitted).

[321] Id. at 515.

With respect to questions of statutory construction, the Seventh Circuit, sitting en banc,[322] has applied the "contrary to law" standard in holding that the Comptroller lacked statutory authority under section 8(b)(1) of the FDIA[323] to impose personal liability on bank directors for losses resulting from approval of loans in excess of statutory lending limits.[324] The appropriate remedy was instead an action under the National Bank Act ("NBA").[325] To this extent, then, there are statutory limits to the broad enforcement powers granted the regulators.

To similar effect is Gulf Fed. S. & L. Ass'n v. FHLBB,[326] in which the Fifth Circuit rejected an FHLBB argument for broad statutory discretion in the enforcement area, in accordance with a "cradle to grave" approach to the regulation of thrift institutions. Rather, the court argued, the statutory formula of "unsafe or unsound" practices was restricted to practices with a reasonably direct effect on a thrift institution's financial soundness.[327]

The jurisdiction of federal district courts to review agency determinations with respect to unsafe and unsound banking practices has been addressed in Mid America Bancorp. v. Board of Governors.[328] In 1979 Mid America, a multibank holding company located in Minnesota, filed notice of a stock redemption plan with the Fed. The Fed concluded that the plan would "unduly burden the earnings and capital of Mid America's subsidiary banks and would constitute an unsafe and unsound practice."[329] Mid America amended the plan to comply with the Board's recommendations.[330] Thereafter, however, the majority shareholders of the holding company announced a plan to liquidate it.[331] The Fed instituted both permanent and temporary cease and desist proceedings, as well as civil money penalty proceedings against Mid America.[332] In turn Mid America sought to enjoin the proceedings in federal district court.[333]

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[322] Larimore, supra note 298.

[323] 12 U.S.C. § 1818(b)(1).

[324] See id. § 84.

[325] See Larimore, 789 F. 2d at 1253.

[326] Supra note 37.

[327] Gulf Fed., 651 F.2d at 265.

[328] 523 F. Supp. 568 (D.Minn. 1980).

The court recognized that section 8(i) of the FDIA[334] withdrew from the district courts the jurisdiction to enjoin or otherwise review administrative proceedings under section 8.[335] In the court's view, there had been no deviation by the Fed from its statutory authority, and the court therefore lacked jurisdiction to enjoin the cease and desist proceedings.[336] Consequently, all administrative remedies had to be exhausted before resort to the courts.[337] Finally, with respect to the temporary cease and desist order, the court denied injunctive relief, reasoning that the alleged potential harm to the plaintiffs was not irreparable.[338]

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[329] Id. at 570.

[330] See id. at 571-72.

[331] See id. at 572.

[332] See id. at 572-73.

[333] Id. at 573.

[334] 12 U.S.C. § 1818(i)(1):

> The appropriate Federal banking agency may in its discretion apply to the United States district court . . . within the jurisdiction of which the home office of the bank is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(Emphasis added.)

[335] Mid America Bancorp., 523 F. Supp. at 575.

B. Analysis of Judicial Interpretations

1. The concept of "unsafe and unsound" practices

Potentially one of the most effective powers of the "appropriate regulator"[339] is its ability to terminate an activity of a bank that the regulator determines to be an "unsafe or unsound" practice in conducting the business of the bank.[340] The concept of an unsafe or unsound banking practice is therefore one of the key, triggering concepts for federal bank supervisory powers. It serves multiple purposes, including: the basis on which a significant number of bank supervisory actions are taken, at least in part;[341] the legal basis on which federal agencies have determined that certain practices are *per se* improper;[342] and, in general, a basis for agency rulemaking.[343]

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[336] *Id.* at 577. In addition, the court determined that the notice of assessment of a civil money penalty was within the Fed's authority under the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.* *See Mid America Bancorp.*, 523 F. Supp. at 577.

[337] *MidAmerica Bancorp.*, 523 F. Supp. at 577.

[338] *Id.* at 578.

[339] *Cf.* note 51, *supra*.

[340] *See*, *e.g.*, 12 U.S.C. §§ 1464(d)(2)(A), 1818(a), (b), (e). *See also* note 145, *supra*.

[341] *See*, *e.g.*, text and accompanying notes 485-87, *infra*.

[342] *See*, *e.g.*, 12 C.F.R. § 563g.10 (FHLBB; unsafe or unsound practices in connection with securities of-

The concept is one that touches the entire operation of a bank.[344] Consequently, it is difficult to articulate an all-inclusive definition of the activities that are covered by the concept. Nevertheless, courts at both the federal and state level have delineated the meaning of the concept within the context of supervisory actions.

The concept has a pedigree that markedly predates its introduction into section 8(b) of the FDIA. A 1908 California case, _People_ v. _Bank_ _of_ _San_ _Luis_ _Obispo_,[345] is illustrative. There the court held that the term "unsafe" had a broad and expansive meaning, reasoning as follows:

> It is true that the phrase "unsafe . . . to continue to transact business," as used in the act,[346] is broader that the term "insolvent," and that a finding that it is unsafe for a banking corporation to continue business does not necessarily mean that it is insolvent. But the converse of this is not true. The act clearly contemplates that it is unsafe for an insolvent banking corporation to continue business.[347]

Indeed, state courts have often addressed the concept of bank safety and soundness. The majority of these cases have arisen within the context of state

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ferings).

[343] _See_ text and accompanying notes 245-59, _supra_. _See also_ Cobb, _supra_ at 3-19.

[344] _But cf._ _Gulf Fed. S. & L. Ass'n_, _supra_ note 37 (limiting concept to financial soundness).

[345] 154 Cal. 194, 97 P. 306 (1908).

[346] Act of March 24, 1903, § 10, Stats. 1903, p. 368, c. 266, _as amended_, Act of March 20, 1905, Stats. 1905, p. 304, c. 296.

[347] _Bank of San Luis Obispo_, 97 P. at 309.

banking statutes designed to ensure a sound financial system,[348] and the concept is a familiar one. An interesting example of the interplay of state and federal regulatory policies is afforded by the recent California case of Perdue v. Crocker National Bank,[349] in which the California Supreme Court addressed the validity of the defendant bank's practice of assessing charges for processing checks drawn on commerical checking accounts without sufficient funds. The Perdue court held that the bank's customer signature card, authorizing the charges, was a valid contract.[350] Although the court held that plaintiff's claim that the signature card was employed in a deceptive and misleading manner failed to state a cause of action, the depositor was granted leave to amend the complaint.[351]

Within the context of bank safety and soundness, the court also examined the validity of a challenged California law prohibiting unreasonable charges or unconscionable penalties.[352] Significantly, the court concluded that the application of state law to bank service charges was not preempted by a comprehensive federal statutory scheme governing this field.[353] In reaching this conclusion, the court noted that no provision of federal banking law mentions bank service charges.[354] The court also rejected the argument of the California Bankers Association as amicus, to the effect that the provisions of FDIA section 8(e)[355] created an actual conflict between state and federal law sufficient to preempt the state law.[356] The court reasoned that, if the mere possibility that bank directors might deem compliance with a state law to be an unsound banking practice was sufficient to trigger liability under FDIA section 8(e) (and hence preemption), the nation's dual banking system would disappear for all practical purposes.[357]

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[348] See, e.g., City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh, 412 A.2d 1366 (Pa. 1980); Ann Arbor Bank & Trust Co. v. Francis, 270 N.W.2d 725 (Mich. 1978); Cross County Savings and Loan Assn. v. Siebert, 403 N.Y.S.2d 864 (1978).

[349] 702 P.2d 503 (Cal. 1985).

[350] Id. at 509-10.

[351] Id. at 525.

[352] See id. at 516 et seq.

[353] Id. at 523.

[354] Id. at 522-23.

Of course, the regulatory term "unsafe or unsound" has long since been codified into federal law, with the result that the contours of the concept are of singular importance to federal supervisory efforts. The various affected federal regulators have often expressed concern over the need to clarify and elaborate upon the concept. So, for example, the FDIC Chairman made the following observations in testimony before the Senate Banking Committee:

> A particular activity not necessarily unsafe or unsound in every instance may be so when considered in light of all relevant facts. Like many other generic terms widely used in the law, such as "fraud," "negligence," "probable cause" or "good faith," the term "unsafe or unsound practices" has a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an unsafe or unsound practice embraces any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk of loss or damage to an institution, its shareholders, or the [FDIC] insurance fund.[358]

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[355] 12 U.S.C. § 1818(e).

[356] See Perdue, 702 P.2d at 517.

[357] Id. at 524.

[358] George LeMaistre, Chairman, FDIC, Testimony before the Senate Committee on the Subject of Overdrafts and Correspondent Banking Practices, CIS, S-241-25 (1977). Cf. FDIC, Manual of Examination Policies, § V, at 3 (1982): an "unsafe or unsound practice is an

Similarly, the OCC has taken the position that unsafe or unsound practices may be defined as those which "may be generally viewed as conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk of loss to a banking institution or shareholder."[359] This formulation was cited with approval by the Fifth Circuit in Groos Nat'l Bank v. Comptroller of the Currency.[360] There the court noted:

> The phrase "unsafe or unsound banking practice" is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.[361]

With the relatively increasing use of cease and desist orders, courts have more frequently been called upon to delineate the scope of the term "unsafe or unsound practice." The experience has in general been favorable to the discretion of the bank regulators. One reason for this may be the comparatively favorable standard of judicial review which the courts have applied in reviewing agency orders.[362]

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action or inaction that is contrary to generally accepted standards of prudent operation which, if continued, would result in abnormal risk of loss or damage to the institution."

[359] First Nat'l Bank of Eden, 568 F.2d at 611 n. 2.

[360] 573 F.2d 884 (5th Cir. 1978).

[361] Id. at 897. See also Independent Bankers Ass. v. Heimann, 613 F.2d 1164, 1168-69 (D.C.Cir. 1979), cert. denied, 449 U.S. 823 (1980) (upholding Comptroller's credit life insurance regulations, 12 C.F.R. pt. 2 (1979), as authorized under 12 U.S.C. § 1818(n) and endorsing liberal construction of authority to define and eliminate unsafe and unsound conduct).

[362] See, e.g., First Nat'l Bank of Eden, supra note 23.

The courts have been relatively flexible in interpreting the scope of the "unsafe and unsound" enforcement provisions. In First State Bank v. FDIC,[363] for example, the Sixth Circuit held that, despite the fact that the bank had improved its loan policy, a cease and desist order was warranted to prevent future abuses.[364] Indeed, the courts have generally recognized that voluntary cessation of a prohibited practice is not a sufficient ground for challenging the issuance of a cease and desist order.[365] In upholding the FDIC's order, the Sixth Circuit adopted the reasoning of the ALJ:

> The facts of this case support the issuance of a cease and desist order. Such an order is an appropriate instrument to deter and prevent future abuses, to correct conditions which have resulted from the unsafe and unsound practices and violations, and to protect the shareholders of the Bank and insure their security in the future. . . . It is also significant to recognize that this is not a case where the Bank voluntarily ceased the complained of practices; rather, the cessation of the activities were directly related to the examination undertaken by the FDIC and that agency's action.[366]

There are, however, apparently some absolute limits to this flexibility, delineated by the limits of the statutory grant of authority as interpreted by the courts. In Gulf Fed. S. & L. Assn.,[367] for example, the Fifth Circuit addressed the limits of the FHLBB's statutory authority to issue cease and desist orders. The S&L had challenged the FHLBB order requiring it to cease and desist from calculating interest on loans under the 365/360 method,[368] when the loan agreements called for the 365/365 method.[369]

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[363] 770 F.2d 81 (6th Cir. 1985).

[364] Id. at 82-83.

[365] See Bellaire, 697 F.2d at 681; Marshfield II, 751 F.2d at 215.

[366] First State Bank, 770 F.2d at 82-83.

[367] Supra note 37.

Gulf Federal argued that the challenged order was unrelated to the FHLBB's traditional function of assuring the financial integrity of thrift institutions.[370] To the contrary, the FHLBB asserted that it had "cradle to grave"[371] authority to regulate thrifts under its supervisory authority and that the order was a legitimate exercise of that authority.[372]

In the court's view, the FHLBB argument for judicial deference was misplaced, for the delimitation of the FHLBB's cease and desist powers required judicial, not administrative, expertise.[373] In this regard, the court reasoned, the "breadth of the unsafe or unsound practice formula is restricted by its limitation to practices with a reasonably direct effect on the [S&L's] financial soundness."[374] The court also stressed[375] the definition of unsafe practices discussed in congressional testimony at the time of the enactment of the FHLBB's cease and desist authority:

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance

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[368] See Gulf Fed., 651 F.2d at 261.

[369] See id. at 262.

[370] Id.

[371] Id.

[372] Id.

[373] Id. at 263.

[374] Id. at 264.

[375] Id.

funds.[376]

In the court's view, the risks the FHLBB identified with respect to Gulf Federal's use of inconsistent contract terms bore only the most remote relationship to the S&L's financial soundness or to the risk to the deposit insurance fund.[377] In holding that the cease and desist order was unauthorized under the FHLBB's statutory powers, the court expressly limited unsafe and unsound practices to practices affecting an institution's financial condition.[378]

An interesting variation on this problem is presented by Otero Savings and Loan Assn. v. Federal Home Loan Bank Board,[379] in which a cease and desist order based upon a violation of law, rather than an unsafe or unsound practice, was challenged and the appropriateness of the remedy questioned. The order found the S&L's "Check-In" program in violation of federal law prohibiting deposit in or withdrawal from interest-bearing accounts through negotiable or transferable third-party instruments.[380] The order directed the S&L to close such accounts held by for-profit corporations and partnerships and to cease offering such instruments.[381]

The S&L argued that it had not violated the statutory prohibition in question,[382] and that in any event the regulatory agencies had no authority to require the remedy mandated by the order.[383] To the contrary, the S&L argued that only the Attorney General had the authority to enforce the prohibition.[384] In response, the FHLBB and the FSLIC relied upon the general cease and desist authority available to them.[385] In this view, the FSLIC had the statutory authority to initiate cease and desist proceedings to prevent the violation of any law.[386]

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[376] 112 Cong. Rec. 26,474 (1966) (quoting remarks of FHLBB Chair John Horne), quoted in Gulf Fed., 651 F.2d at 264.

[377] Gulf Fed., 651 F.2d at 264. The estimated overcharges totaled approximately $80,000 on assets of approximately $75 million. Id. n. 4.

[378] Id. at 265.

[379] 665 F.2d 279 (10th Cir. 1981).

[380] See 12 U.S.C. § 1832(a) (1976).

[381] See Otero, 665 F.2d at 281.

[382] See id. at 282.

In concluding that the FHLBB and the FSLIC had statutory authority under the cease and desist provisions to enforce the prohibition, the court rejected the S&L's assertion that a successful challenge to the exercise of that authority on the facts of the case would not "weaken the FSLIC's ability to 'discharge its basic mission of ensuring the safe and sound operation of insured institutions.'"[387] In this regard, the court reasoned:

> [T]he coherence of the regulatory scheme would be disrupted by a holding that § 1832 can only be enforced by the Attorney General. Given the broad language of § 1730(e)[, the cease and desist authority], we hold that the FSLIC, with its expertise in financial matters, may use its cease-and-desist powers to remedy violations of § 1832 which expresses an important policy on regulations of the operation of state chartered insured institutions, along with others covered by the Act.[388]

The courts have in fact found it possible to work with the flexible concept of "unsafe and unsound" practices, and to give it definite content. So, for example, among the kinds of specific actions or activities that have been held to represent unsafe or unsound banking practices may be included the following:

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[383] See id. at 284.

[384] Id., citing 28 U.S.C. § 516.

[385] 12 U.S.C. § 1730(e)(1). See Otero, 665 F.2d at 283.

[386] Otero, 665 F.2d at 283-84.

[387] Id. at 286.

[388] Id.

(*i*) a pattern of loans made with inadequate security;[389]

(*ii*) inordinate concentration of extensions of credit to one borrower and the borrower's related interests;[390]

(*iii*) excessive volume of low quality assets in relation to total equity capital, due to hazardous lending and lax collection practices;[391]

(*iv*) excessive volume of overdue loans in relation to gross loans, due to hazardous lending and lax collection practices;[392]

(*v*) inadequate loan policies;[393]

(*vi*) accumulation of an inordinate amount of unsafe assets, in relation to gross capital;[394]

(*vii*) failure to implement adequate internal controls and auditing procedures;[395]

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[389] *See Bank of Dixie*, 766 F.2d at 176.

[390] *See id.* (extensions of credit aggregating 47 percent of bank's total equity capital); *Groos Nat'l Bank*, 573 F.2d at 896-97.

[391] *See Bank of Dixie*, 766 F.2d at 176.

[392] *See id.* at 177.

[393] *See First State Bank* v. *FDIC*, 770 F.2d 81 (6th Cir. 1985).

[394] *See First Nat. Bank of Eden*, 568 F.2d at 611 n. 1 (unsafe assets representing 37 percent of gross capital funds).

[395] *See id.*

(viii) failure to maintain adequate credit information on certain debt obligations in bank's investment portfolio;[396]

(ix) payment of excessive bonuses to bank officers;[397]

(x) payment of excessive salaries to bank officers;[398]

(xi) conflicts of interest and self-dealing by bank officials;[399]

(xii) undue burden on earnings and capital resulting from proposed stock redemption;[400]

(xiii) violations of lending limits;[401] and,

(xiv) unconscionable service charges.[402]

Presumably, charges of unsafe and unsound practices may also be interrelated to violations of statutory restrictions as well.[403]

2. Violations of written agreements

It should also be noted that the cease and desist power may also be triggered by violation of a written agreement with the appropriate regulator.[404] Presumably, the material terms of the underlying agreement should relate to conduct which itself would arguably be unsafe or unsound.[405] However, this is not spelled out in the legislation itself, and is not fully tested by judicial reaction to cease and desist orders issued on the basis of violations of such agreements. Groos Nat'l Bank illustrates the point. There the court held that extensions of credit by a bank in violation of a previous written agreement between the bank and the OCC constituted unsafe and unsound practices.[406]

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[396] See id. Cf. 12 C.F.R. § 1.8.

[397] See First Nat. Bank of Eden, 568 F.2d at 611 n. 1.

[398] See id.

[399] Independent Bankers Ass., 613 F.2d at 1168 (personal commissions for sales of credit life insurance in connection with extensions of credit by bank); First Nat. Bank of Lamarque, 610 F.2d at 1265 (same).

[400] Cf. Mid America Bancorp., 523 F. Supp. at 570.

[401] Cf. del Junco, 682 F.2d at 1341.

[402] Cf. Perdue, 702 P.2d at 517 n. 20.

[403] See First Nat. Bank of Bellaire, 697 F.2d at

A 1973 bank examination had revealed several apparently illegal and unsafe practices, including a high percentage of high-risk loans to Clinton Manges, a controlling shareholder of the bank.[407] After the institution of cease and desist proceedings, the parties entered into an agreement, under which the bank was to deconcentrate its loans and to render them less risky.[408] Article II of the agreement precluded all loans and extensions of credit, direct or indirect, to any shareholder owning five percent or more of the bank's voting securities, as well as to such a shareholder's "related companies or individually."[409]

In 1975 the Comptroller discovered that three extensions of credit had apparently been made to Manges in violation of the 1973 agreement. Before the Comptroller instituted cease and desist proceedings, the bank brought an action for declaratory judgment that the agreement was invalid. Thereafter, the Comptroller

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678 (violations of 12 U.S.C. §§ 29; 375).

[404] See text and accompanying notes 146-51, supra.

[405] Cf., e.g., Groos Nat'l Bank, 573 F.2d at 896.

[406] Id. at 896-97.

[407] Id. at 892.

[408] Id.

[409] Id.

issued a temporary cease and desist order. After hearings before an ALJ, a final cease and desist order was entered and the bank appealed.[410]

The Fifth Circuit affirmed the Comptroller's order and rejected the bank's argument that the 1973 agreement was invalid because of a lack of consideration. In the court's view, the statutory provision in question[411] "provides that a cease and desist order may issue upon any violation of an agreement between the agency and a bank and says nothing of consideration."[412] Accordingly, the court concluded, the challenged 1975 extensions of credit violated a valid agreement within the meaning of the statute and the violations were unsafe and unsound practices.[413]

3. Scope of suspension and removal powers

With regard to the suspension and removal powers of the regulators, the results have been mixed. In _Manges_ v. _Camp_,[414] for example, the OCC had issued an order prohibiting Manges, a controlling shareholder of a national bank, from participation in the affairs of the bank, in light of past felony charges. Manges brought suit challenging the order and seeking an injunction restraining the OCC from enforcing the order.

The issue in _Manges_ was, therefore, whether the OCC had acted within the scope of its authority under 12 U.S.C. § 1818(g)(1).[415] The Comptroller argued that the provision covered not only present conduct but also past felony charges and convictions. The purpose of the provision, in the court's view, was to the contrary "to routinely eliminate any person who is convicted or charged with a felony involving a breach of trust while he is at the same time participating in the affairs of a national bank."[416] Accordingly, the court reversed the trial court and directed that the injunction be issued.[417]

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[410] _See_ _Groos_ _Nat'l_ _Bank_, 573 F.2d at 894.

[411] 12 U.S.C. § 1818(b)(1).

[412] _Groos_ _Nat'l_ _Bank_, 573 F.2d at 896.

[413] _Id_. at 897.

[414] 474 F.2d 97 (5th Cir. 1973).

[415] _Cf_. text and accompanying notes 164-66, _supra_.

The suspension and removal provisions may also be triggered by a failure to act as well as by improper conduct. This point is illustrated by Brickner v. FDIC,[418] involving an appeal by an assistant cashier and a vice president from an order removing them under FDIA section 8(e).[419] The underlying facts involved the improper conduct of the cashier of the bank, who had repeatedly made unauthorized extensions of credit in excess of the bank's lending limit.[420] The cashier had resigned at the request of the FDIC.[421] Thereafter, the FDIC determined that the collateral securing the unauthorized extensions of credit no longer existed.[422] Removal proceedings were subsequently initiated against the assistant cashier and the vice president, based upon their failure to act with respect to the cashier's activities.[423]

The FDIC had charged that in tolerating the cashier's activities the two officers had breached their fiduciary duties to the bank and had demonstrated a willful or continuing disregard for the safety and soundness of the bank.[424] The Eighth Circuit upheld the removal order, reasoning that

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[416] 474 F.2d at 100-01.

[417] Id. This was not the end of Mr. Manges' difficulties, however. As was noted earlier, his activities were later the subject of a cease and desist order upheld by the Fifth Circuit in Groos Nat'l Bank, supra.

[418] 747 F.2d 1198 (8th Cir. 1984).

[419] 12 U.S.C. § 1818(e).

[420] See Brickner, 747 F.2d at 1200.

[421] Id.

[422] See id.

[423] See id. at 1200-01.

> petitioners admittedly knew for months that [the cashier] was engaging in unsafe and unsound banking practices, yet they failed to disclose this knowledge to the other directors or to take suitable action to prevent substantial losses to the Bank. We find no error in the FDIC's determination that petitioners' conduct demonstrated the sort of "continuing disregard" contemplated by the statute.[425]

Thus, continuing inactivity on the part of officers, in the face of known unsafe and unsound practices on the part of another officer, constitutes improper "conduct" for purposes of the removal authority of the FDIA. It should be noted, however, that the court appears to be working not with a notion of derivative or vicarious liability, but rather with an implicit affirmative fiduciary duty to disclose, or otherwise act to correct, unsafe or unsound practices within their knowledge. Failure to act in face of this duty constitutes improper behavior.

4. Administrative discretion to fashion remedies

One issue that has arisen in judicial review of formal adjudications has been the scope of the agencies' discretion in fashioning remedies for criticized activities of banks. Generally, the agencies have been accorded a wide degree of discretion in this regard, subject to minimal judicial review. So long as predicate factual findings are supported by substantial evidence,[426] the decision of an agency as to the appropriate remedy to be imposed is left to the regulatory expertise and discretion of the agency, unless it is shown to be arbitrary or capricious.[427] Certain particular situations have on occasion strained the limits of judicial deference in this regard.

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[424] See id. at 1200.

[425] Id. at 1203.

[426] See, e.g., First Nat'l Bank of Eden, 568 F.2d at 611; Bank of Dixie, supra note 297.

It should be emphasized that there are clear indications in the case law in this area that the courts have treated the issue of bank regulators' administrative discretion as to remedies in accordance with generally applicable principles of administrative law. Thus, in Otero Savings and Loan Assn,[428] on the issue of the substantive terms of the cease and desist order in that case, the S&L argued that the FSLIC's remedial power did not extend to requiring that an insured institution refrain from conduct once prohibited but currently lawful.[429] To the contrary, the S&L argued that the agency's authority was limited to ordering a cessation of unlawful conduct. In examining this argument, the Tenth Circuit endorsed the views expressed in such cases as American Power & Light Co. v. SEC[430] and Phelps Dodge Corp. v. NLRB,[431] to the effect that "'the relation of remedy to policy is peculiarly a matter for administrative competence,'"[432] and that the agency's knowledge, expertise and choice of remedy must be given special respect.[433]

Nevertheless, on the peculiar facts of Otero Savings and Loan Assn. itself, the court determined that the FHLBB order could not be upheld.[434] The court had noted that congressional intent in creating cease and desist powers was to provide regulatory agencies supervising depository institutions "additional flexible and effective supervisory powers . . . , within carefully guarded limits, in order to make sure that [such institutions] would continue to serve the Nation effectively and well."[435] Further, the Otero court looked to the general guidance of FSLIC v. Fielding,[436] where the court had stated:

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[427] See, e.g., First Nat'l Bank of Eden, 568 F.2d at 611; Dakota Nat. Bank & Trust Co., 554 F.2d at 350-51.

[428] Supra note 379.

[429] Otero, 665 F.2d at 288.

[430] 329 U.S. 90 (1946).

[431] 313 U.S. 177 (1941).

[432] Otero, 665 F.2d at 289, citing American Power & Light Co. 329 U.S. at 112, quoting Phelps, 313 U.S. at 194.

[433] Otero, 665 F.2d at 289.

> The Congressional reports repeatedly emphasized the importance of the division of regulatory power between the national and state governments. The purpose of the enforcement provisions is to quickly stop fraudulent practices, not to affirmatively recover for them.[437]

Accordingly, the Otero court stated that the FHLBB's enforcement power authorized the agency only to ensure that institutions conducted their affairs in a legal and safe and sound manner. The power did not provide a mandate to employ any means necessary to maintain a competitive balance among institutions.[438]

This is not to say that, assuming the presence of unlawful or unsafe and unsound conduct, the agencies will not be afforded judicial deference to fashion appropriate, flexible remedies. In Brickner,[439] for example, the Eighth Circuit rejected arguments of removed bank officers challenging the remedy, to the effect that the FDIC had abused its discretion in applying such a drastic remedy for their failure to act.[440] In doing so, the court expressly relied upon the general principles enunciated in such cases as American Power[441] and Canadian Tarpoly Co. v. United States Int'l Trade Comm'n,[442] to the effect that

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[434] See id.

[435] Id. at 288, quoting 1966 U.S. Code Cong. & Ad. News 3538.

[436] 309 F. Supp. 1146 (D.Nev. 1969), cert. denied, 400 U.S. 1009 (1971).

[437] Fielding, 309 F. Supp. at 1149.

[438] Otero, 665 F.2d at 289.

[439] Supra note 418.

> administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority. The relation of remedy to statutory policy is peculiarly a matter for special competence of the administrative agency.[443]

Similarly, in del Junco v. Conover,[444] the Ninth Circuit reviewed a remedy fashioned by the Comptroller, pursuant to section 8(b)(1) of the FDIA,[445] with respect to a violation of the lending limits of the NBA.[446] The Comptroller had required, among other things, that the bank directors reimburse the bank for its costs of collection and for the attorneys' fees it had paid for the directors' defense.[447] The court asserted that the Comptroller had broad discretion to fashion a remedy and to cure the effect of the violation.[448] Finally, as to the attorney's fees, the court concluded that "deference is due to the Comptroller's interpretation of the law under which he operates."[449]

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[440] See Brickner, 747 F.2d at 1203-04.

[441] Supra note 430.

[442] 640 F.2d 1322 (C.C.P.A. 1981).

[443] Brickner, 747 F.2d at 1203, quoting Canadian Tarpoly, 640 F.2d at 1326; American Power, 329 U.S. at 112.

[444] 682 F.2d 1338 (9th Cir. 1982).

[445] 12 U.S.C. § 1818(b)(1).

[446] See id. § 84 (NBA; lending limitations applicable to national banks). See also 12 C.F.R. pt. 32 (OCC regulations; lending limitations).

[447] See del Junco, 682 F.2d at 1339-40.

[448] Id. at 1343.

The Fifth Circuit, however, appeared more critical of the Comptroller's remedial powers under section 8(b)(1), in its lengthy opinion in _First Nat. Bank of Bellaire_ v. _Comptroller_.[450] Although the court acknowledged the Comptroller's wide discretion,[451] it stressed that "the Comptroller must be able to articulate a correlation between the action taken and the reason given for the action. Reasons which are in substance mere rhetoric are not sufficient and indicate arbitrary action."[452] The court also emphasized that the Comptroller must attempt to maintain a balance among the interests of depositors, the interest of well managed banks, and the interest of the regulators.[453]

In _First Nat. Bank of Bellaire_, the Comptroller had charged the bank with violations of statutory limitations on bank ownership of real estate[454] and restrictions on lending to insiders.[455] In the court's view, there was a direct relationship between the charged violations and bank safety, and as a result the cease and desist orders were upheld as to these violations.[456] However, with respect to the Comptroller's allegation "that contrary to safe and sound banking practices, the Bank had been operating with inadequate capital,"[457] the court concluded that the cease and desist order was not supported by substantial evidence, and that the remedy imposed by the order therefore could not be upheld.[458] In this regard the court reasoned:

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[449] _Id_. at 1344.

[450] 697 F.2d 674 (5th Cir. 1983).

[451] _See id_. at 680.

[452] _Id_.

[453] _Id_. at 681.

[454] _See_ 12 U.S.C. § 29. _See also First Nat. Bank of Bellaire_, 697 F.2d at 682.

[455] _See_ 12 U.S.C. § 375. _See also First Nat. Bank of Bellaire_, 697 F.2d at 682.

[456] _See First Nat. Bank of Bellaire_, 697 F.2d at 683.

> In reviewing the Comptroller's findings we must not substitute our judgment for that of the Comptroller. This Court must determine if the Comptroller made a reasonable finding, not whether it made a correct finding. The findings are unreasonable if there is no rational connection between the evidence as a whole and the findings.[459]

The variant degrees of tolerance evident in the del Junco and Bellaire cases are set in direct opposition in Larimore v. Conover,[460] involving a challenge to an OCC cease and desist order which required directors to indemnify the bank for all losses incurred on account of excessive loans made in violation of the lending limitations of the NBA.[461] In upholding the order, a panel of the Seventh Circuit determined that the Comptroller's findings were supported by substantial evidence[462] and that the remedy was not arbitrary or capricious.[463] Moreover, the court noted:

> The violations here were not minimal oversights or a mere failure to implement obscure banking regulations. As bank directors, the petitioners were responsible for conducting the business of the [national bank] in a safe and sound manner and in accordance with the law. The directors had been

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[457] Id. at 684.

[458] Id.

[459] Id. at 685 (citations omitted).

[460] Supra note 298.

[461] 12 U.S.C. § 84.

[462] Larimore, 775 F.2d at 896.

[463] Id.

> previously warned of the need to comply with loan limits by the [OCC] during [a] 1980 audit.[464]

However, after a rehearing _en banc_ the Seventh Circuit reversed and held that the Comptroller lacked the statutory authority to impose personal liability on the directors for the losses.[465] In the court's view, the legislative history of FDIA section 8[466] did not support the argument that the flexible authority to fashion remedies under the cease and desist provisions extended so far as to afford the Comptroller power to impose personal liability on directors for violations of lending limitations.[467]

In reaching this conclusion, the Seventh Circuit distinguished two factually similar cases. In _First National Bank of Eden_,[468] the Comptroller had issued an order requiring bank officers to reimburse the bank for bonuses paid to them.[469] Drawing the finest of distinctions, the _Larimore_ court distinguished this remedy as being "in the order of restitution, rather than damages to recover bonuses traced to the bank's president and vice-president who had unjustly enriched themselves."[470] Similarly, in _del Junco_,[471] while the court did uphold an order to directors to indemnify the bank for losses resulting from illegal extensions of credit, it had not specifically addressed the question of the Comptroller's authority unilaterally to impose personal liability.[472]

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[464] _Id_.

[465] _Larimore_, 789 F.2d at 1251.

[466] 12 U.S.C. § 1818. _See generally_ text and accompanying notes 99 _et seq._, _supra_.

[467] _Larimore_, 789 F.2d at 1251.

[468] _Supra_ note 23.

[469] _See First Nat. Bank of Eden_, 568 F.2d at 611.

[470] _Larimore_, 789 F.2d at 1254.

[471] _Supra_ note 444.

The Larimore court's treatment of First National Bank of Eden and the difference between restitution and damages seems to be a distinction without a difference. In any event, in the context of a question of statutorily based authority to fashion an administrative remedy, reliance on the distinction seems misplaced. There is no indication in the legislative history that the scope of administrative discretion to fashion a remedy was to be artificially constrained by such notions.

The court's treatment of del Junco is even less satisfying. It asserts that the two cases are distinguishable, but it does not adequately explain the difference between the two. In point of fact, the Seventh Circuit is rejecting the del Junco approach. In part, this rejection is undoubtedly based upon the Larimore court's understanding of the appropriate relationship between the general enforcement remedies of FDIA section 8 and the specific cause of action created by the NBA[473] with respect to violations of the NBA's provisions (including the lending limitations).

In this regard the Larimore court noted that the NBA authorized the Comptroller to institute an action against bank officers in their individual capacities for damages resulting from a knowing violation of the lending limits of the NBA.[474] Consequently, the court concluded, the "clear intent of [12 U.S.C. §] 93 [of the NBA] would be cast aside if [FDIA section 8(b)(1)] were to be interpreted as granting the Comptroller the authority to act as prosecutor, judge, and jury."[475]

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[472] See Larimore, 789 F.2d at 1255.

[473] 12 U.S.C. § 93(a).

[474] Larimore, 789 F.2d at 1255.

[475] Id. at 1255-56. For an interesting case rejecting an argument for extending the Larimore rationale to the imposition of civil money penalties, see Abercrombie, 641 F. Supp. at 601-602.

V. SUMMARY AND ANALYSIS OF PRACTICAL DATA

A. Relative Numbers of Proceedings

The annual aggregate total numbers of administrative enforcement actions for all agencies is considerable. These aggregate numbers conceal, however, a rather uneven set of trends when the data are considered in terms of types of enforcement actions. In addition, the level of activity varies markedly when the data are viewed from the perspective of individual agencies.

Comparing results in the period 1982 through 1986 (*see* Illustrations 2 - 6, *infra*), there has been a marked increase overall in enforcement actions,[476] with something of a peak in 1985 in particular. (*See* Illustration 5, *infra*.) Consistently throughout this period, the OCC and the FDIC have been the most active -- or, at least, have had the most enforcement actions -- of the five agencies. They have been followed by the Fed and the FHLBB, with their relative positions varying from year to year. The NCUA has been the least active in this regard.

Even this articulated representation of enforcement activity is a misleading one, however, for two reasons. First, almost all of the actions reported in the preceding illustrations were the result of consents or waivers on the part of the respondents, with no formal (or even informal) administrative adjudication taking place.[477]

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[476] For purposes of this analysis, the term "enforcement actions" is used generically to refer to the issuance of cease and desist orders, the initiation of suspension, removal and prohibition proceedings, and the assessment of civil money penalties.

[477] *See*, *e.g.*, FDIC, *Annual Report* 12 (1986) (majority of enforcement actions initiated were settled by consent agreement); FDIC, *Annual Report* 22 (1985) (over 95 percent settled by consent). *See also* FHLBB, *Annual Report* 49 (1986) (most settled by "informal consent"); FHLBB, *Annual Report* 47 (1985) (same).

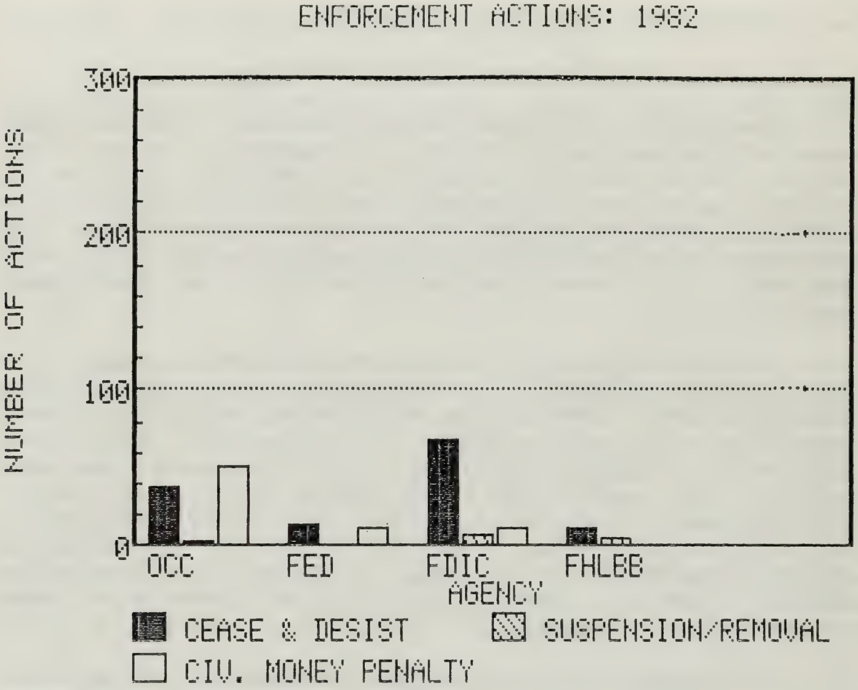

Illustration 2 Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1982.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1982.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1982.

d. NCUA data not available for 1982.

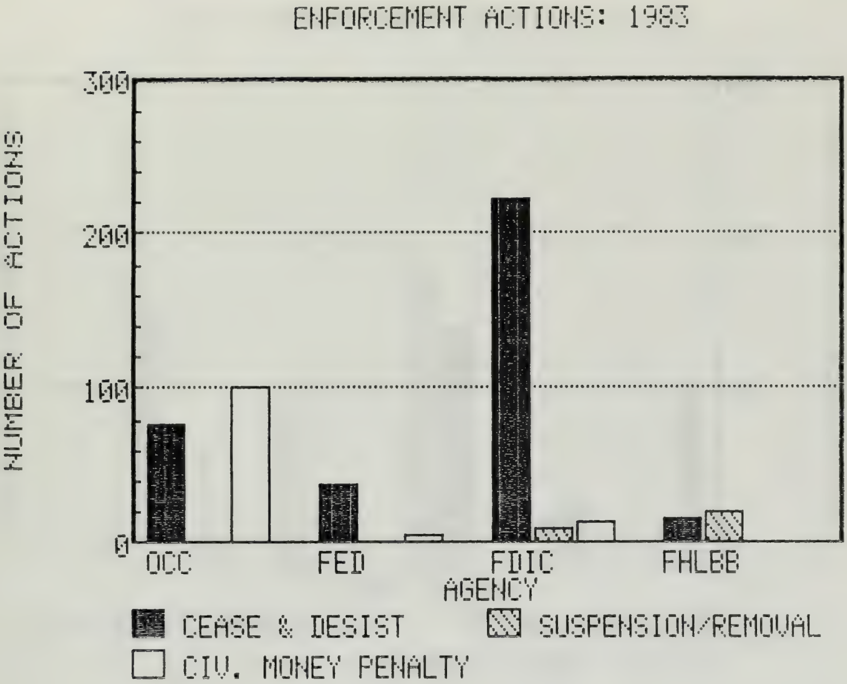

Illustration 3 Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1983.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1983.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1983.

d. NCUA data not available for 1983.

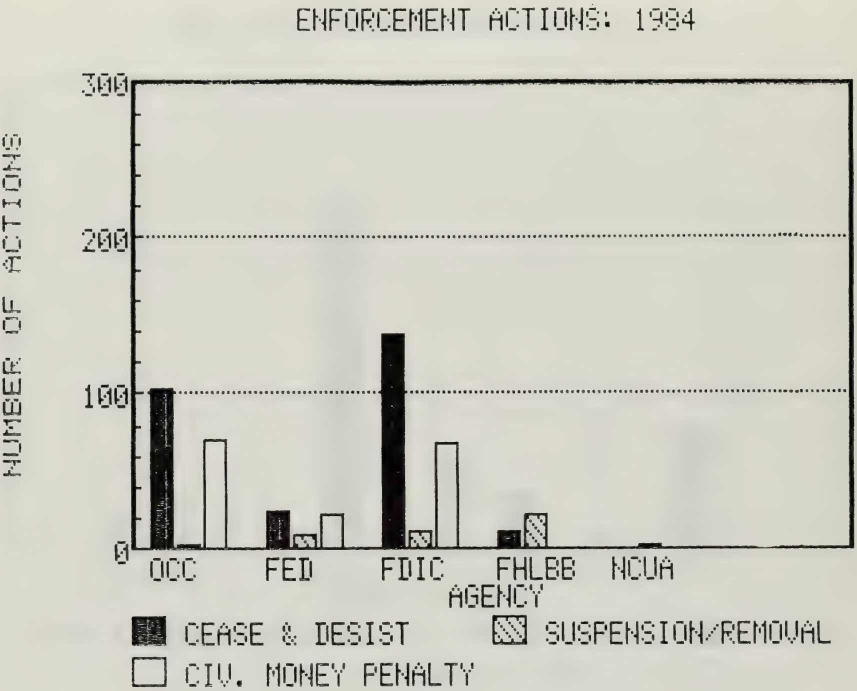

Illustration 4 Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1984.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1984.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1984.

d. NCUA entries include one cease and desist order and three suspension/removal actions.

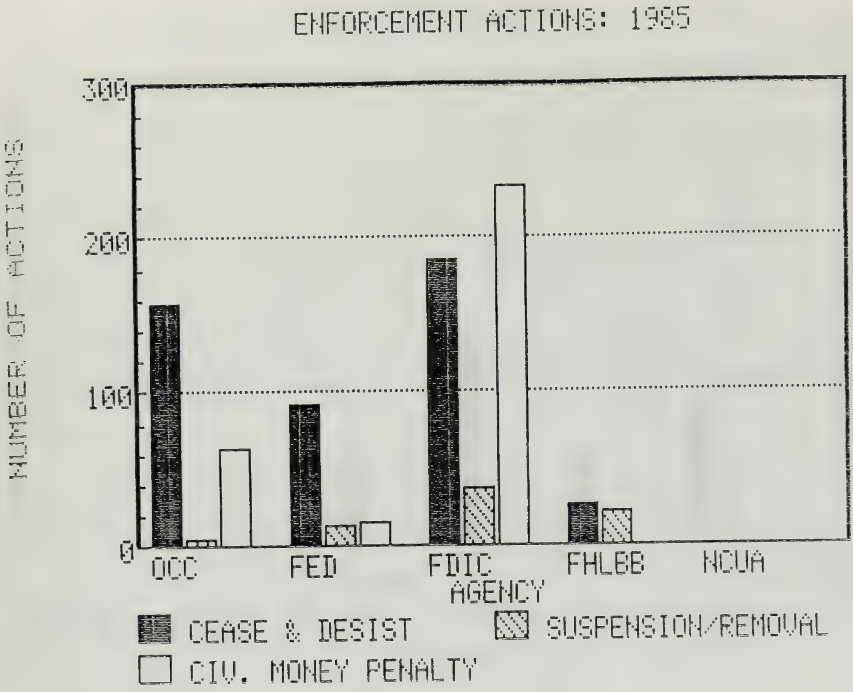

Illustration 5 Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1985.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1985.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1985.

d. OCC entries do not include six agreements for removal.

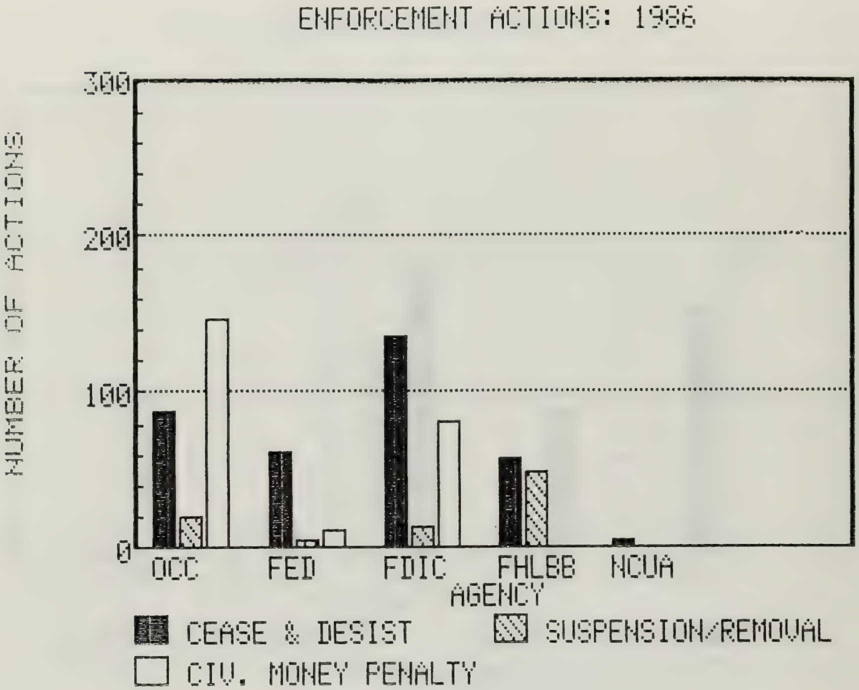

Illustration 6 Sources: Agency reports and memoranda

a. Figures reported for cease and desist orders include temporary and amended orders issued in 1986.

b. Figures reported for "suspension/removal" include all suspensions, prohibitions on participation, and removal proceedings initiated in 1986.

c. Figures reported for civil money penalties represent total number of penalties assessed in 1986.

d. OCC entries do not include four agreements for removal.

e. NCUA entries represent five cease and desist orders.

Indeed, formal administrative adjudication has been a rarity. For example, in 1986, with 88 cease and desist orders issued,[478] the OCC held only 11 APA hearings.[479] Likewise, the FDIC, with 135 cease and desist orders issued in the same year, held only 16 hearings.[480] The other agencies averaged one hearing each.[481] The experience of 1986 is representative of agency practice in this regard.

Second, and perhaps even more significant, is the fact that only relatively small number of enforcement problems are resolved through the use of formal enforcement measures at all. To the contrary, there seems to be a preference for the use of formal agreements,[482] "memoranda of understanding,"[483] and other simlarly informal compliance devices.[484] A fair representation of agency reliance on such informal devices as the formal agreement and the memorandum of understanding, as opposed to the cease and desist order, is afforded by the experience of OCC administrative actions in 1986. (See Illustration 7, infra.)

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[478] It should be noted, however, that this figure includes a small number of temporary cease and desist orders (2) and amended cease and desist orders (6).

[479] Data included with Letter from Mary Wildemann, staff attorney, Enforcement and Compliance Division, Office of the Chief Counsel, OCC, to Professor Michael P. Malloy, October 30, 1987.

[480] FDIC, Annual Report 12 (1986).

[481] See, e.g., FHLBB data provided with Letter from Nancy Kreitzer, Paralegal Specialist, Office of Enforcement, FHLBB, to Professor Michael P. Malloy (June 4, 1987); NCUA data provided with Letter from Allan H. Meltzer, Assistant General Counsel, NCUA, to Professor Michael P. Malloy (July 8, 1987).

[482] The formal agreement is statutorily based. See 12 U.S.C. § 1818(b)(1). However, the conclusion of a formal agreement neither requires nor contemplates any particular formal procedures. It is significant, however, in that a formal agreement once concluded can be enforced through the issuance of a cease and desist order and subsequent judicial enforcement of the order. See id. See also OCC, The Director's Book: The Role of a National Bank Director 72 (1987).

[483] Unlike the formal agreement (see note 482, supra), the memorandum of understanding is entirely a

One other interesting feature is evident from Illustration 7, and this feature seems to be consistently present in administrative enforcement activities. Taking the categories of memoranda of understanding, formal agreements, and cease and desist orders, in each category the trend was towards the imposition of administrative sanctions of each type more often in the case of relatively small institutions (in terms of asset size).

In sum, while the annual aggregate total number of administrative enforcement actions for all the agencies is considerable, particularly for the OCC and the FDIC, the vast majority of these represent cases in which the final action was taken on the basis of either consent or waiver of formal hearings. In addition, those aggregate totals do not reflect the preference of the agencies for alternative enforcement devices which do not trigger the procedural requirements of the statutory enforcement authorities generally available to the agencies. The resolution of most enforcement problems involve the conclusion of formal agreements or "memoranda of understanding" (or "informal agreements"), rather than, for example, cease and desist orders. Current administrative practice tends to avoid the use of formal administrative adjudication, either by leveraging consent to an order from the respondent or by hammering out an informal, and procedurally unspeci-

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creature of agency practice. Violation of a memorandum of understanding does not, as a matter of law, in itself trigger the imposition of formal sanctions such as the issuance of a cease and desist order. See OCC, The Director's Book at 72.

[484] These other informal devices, entirely creatures of agency practice, carry a variety of more or less arbitrary labels, such as "commitment letter." See generally OCC, The Director's Book at 71-72.

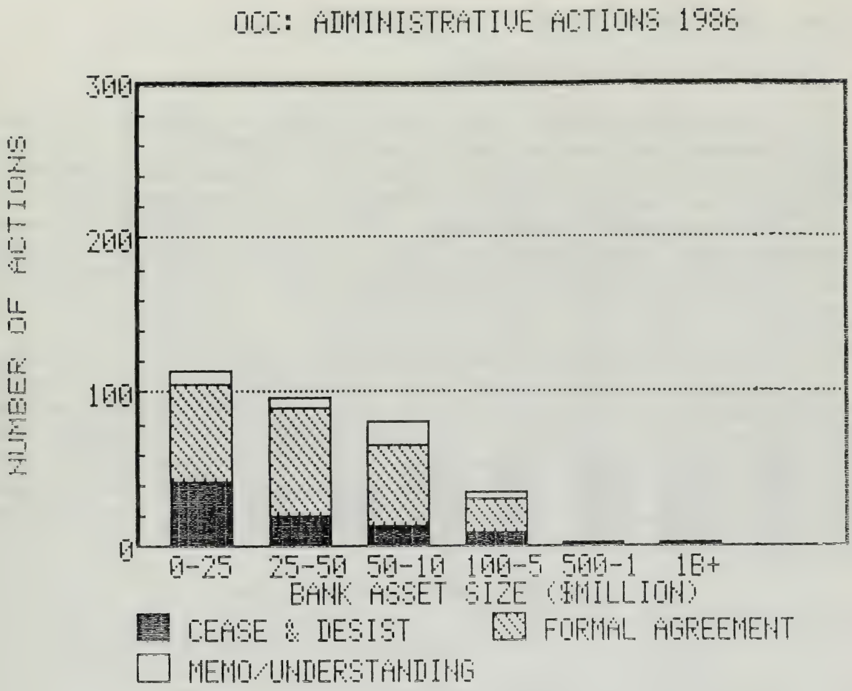

Illustration 7 Source: OCC Quarterly Journal

fied, agreement with the respondent.

B. Decisional Trends

One predominant basis for action in administrative enforcement actions appears to be violations of law or previously issued final orders or formal agreements. Often this basis will be coupled with charges of "unsafe and unsound" practices. Few cases present "unsafe and unsound" practices as the sole or principal basis for administrative action. (*See*, *e.g.*, Illustration 8, *infra*.)

In particular it would appear that, for example, the OCC's enforcement efforts with respect to unsafe and unsound practices have in the past been centered on such issues as conflicts of interest, self-dealing, and insider abuses. For example, during 1977 Senate hearings, the following problem areas were identified as being practices that frequently occurred in the administrative enforcement context:

(*i*) improper bank stock loans;

(*ii*) preferential loans to favored customers;

(*iii*) improper overdrafts;

(*iv*) failures to comply with banking laws or regulations;

(*v*) improper insurance commissions;

(*vi*) double use of collateral; and,

(*vii*) insider overreaching.[485]

Of related interest, the FDIC has consistently maintained that unsafe and unsound practices may arise as a result not only of action but also of inaction of management.[486] Specific illustrations of unsafe or

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[485] *Senate Committee Hearings on the Subject of Overdrafts and Correspondent Banking Practices*, CIS, S-241-25, 1977.

[486] *See*, *e.g.*, FDIC, *Manual of Examination Poli-*

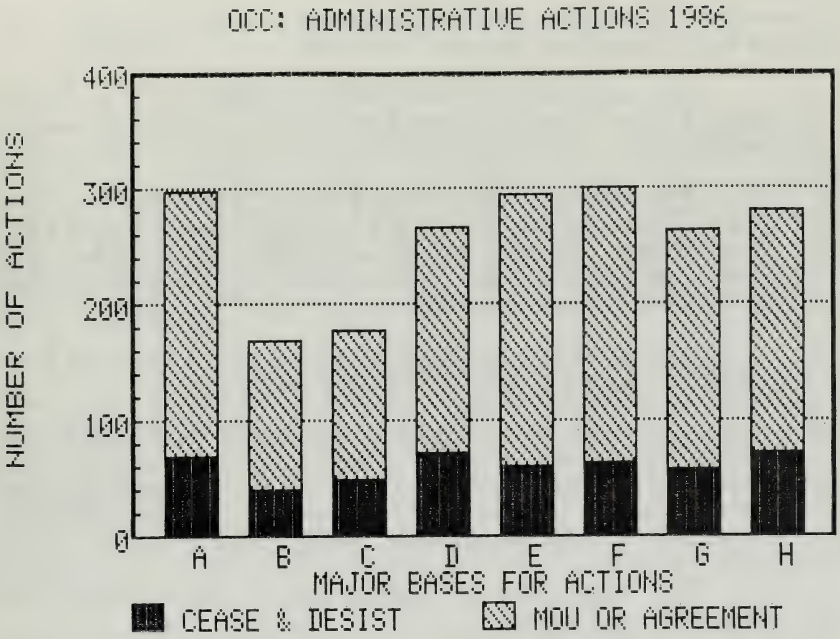

Illustration 8 Source: OCC Quarterly Journal

a. The "major bases" for administrative actions (cease and desist orders, formal agreements and memoranda of understanding) are those involved in substantially over 50 percent of total actions (334). More than one basis may be involved in any one action. The bases are as follows:

A. Allowances for loan or lease losses	B. Asset/liability management
C. Brokered deposits	D. Capital plan
E. Credit information	F. Criticized assets
G. Internal loan review	H. Violations of law

b. Violations of law are often multiple in any one action; the chart counts only one per action.

unsound actions or inactions based upon past FDIC enforcement proceedings would include:

(*i*) operating with an inadequate level of capital in light of the kind and quality of assets held;

(*ii*) engaging in hazardous lending or lax collection practices (*e.g.*, inadequate security, inadequate documentation of creditworthiness, inadequate controls on overdrafts, inadequate credit risk diversification);

(*iii*) operating with inadequate liquidity in light of assets and liability mix;

(*iv*) operating with inadequate internal controls (*e.g.*, no controls on official checks and unissued certificates of deposit, no segregation of duties of personnel, no reconciliation of differences in correspondent bank accounts);

(*v*) engaging in speculative hazardous investment policies;

(*vi*) excessive dividends in relation to capital, earnings capacity and asset quality;

(*vii*) inadequate supervision of officers;

(*viii*) inadequate reserves for possible loan losses;

(*ix*) failure to post the general ledger promptly;

(*x*) improper accounting for transactions;

(*xi*) failure to enforce repayment of loans;

(*xii*) failure to obtain or maintain evidence of priority of liens on loans secured by real

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cies, §5, at 3 (1983).

estate.[487]

C. Incidence of Judicial Review

The incidence of judicial review has been negligible, in terms of absolute numbers. It would appear rare in any given year for the number of cases of appeals for judicial review of formal administrative sanctions to average more than one per agency, if even that. For example, in 1986 the FDIC noted one appeal from a cease and desist order.[488] The FHLBB noted two such challenges in 1986.[489]

In large part, this phenomenon is of course due to the attrition that occurs, from consents and waivers, between initiation of administrative enforcement and the formal adjudication stage. Judicial review is statutorily limited to the results of the latter stage. Further, many enforcement problems will never even reach the formal enforcement stage, being resolved instead through the use of informal enforcement devices.

Nevertheless, despite the relatively small incidence of judicial review, practice would seem to indicate that courts have taken the judicial review function as a matter of active concern. On the other hand, practice in this regard is probably skewed in any event, since the selective process of attrition with respect to formal administrative adjudications doubtless results in a relatively high percentage of judicial challenges concerned with extreme or pathological cases. The self interest of respondent banks and insiders will generally dictate folding at an early stage in the enforcement process, with the result that sensitive enforcement problems are veiled by the confidentiality that surrounds the process until the litigation stage.

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[487] See M. A. Cobb, Federal Regulation of Depository Institutions: Enforcement Powers and Procedures 3-4 (Supp. 1986).

[488] See FDIC, Annual Report 14 (1986).

[489] See FHLBB, Annual Report 49 (1986).

VI. EVALUATION AND RECOMMENDATIONS

A. Publication of Opinions/Decisions

Data is not readily available concerning the decisions of the regulators with respect to formal adjudications.[490] However, it is one thing to keep the "papers and documents filed during the course of a proceeding"[491] confidential; it is quite another to throw a blanket of obscurity over the rationes decidendi of enforcement adjudications. While aggregate data concerning, and occasionally brief summaries of, enforcement actions are made available by the regulators,[492] there is currently no publication or other

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[490] Cf. note 9, supra. This is reinforced, as a formal matter, by the regulations themselves, which specifically impose strict confidentiality on the proceedings. See, e.g., 12 C.F.R. § 19.16 (OCC regulations; confidentiality of proceedings), which provides as follows:

> Unless and until otherwise ordered by the Comptroller, any information obtained and any papers and documents filed during the course of a proceeding are for the confidential use only of the Comptroller, the presiding officer, and the parties.

See also id. §§ 263.20 (Fed regulations; confidentiality of documents), 308.20 (FDIC regulations; same), 509.21 (FHLBB regulations; same), 747.120 (NCUA regulations; same).

[491] Id. § 19.16.

[492] For example, until 1986, the FDIC's annual reports at least informed the public that

> A case-by-case [yearly] summary of [the] FDIC's . . . enforcement actions without banks' names may be obtained from the FDIC Corporation Communications Office.

FDIC, Annual Report 23 (1985). A statement to this effect did not appear in the corresponding discussion of the 1986 annual report. The prior reports also similar public dissemination of the decisions in administrative adjudications.[493]

Such a situation hampers not only scholarly meanderings but also the practical ability of counsel to research and to advise bank and bank officer clients that may be potential respondents in possible enforcement actions.[494] In addition, it may contribute to the discomfort of ALJs in attempting independently to come

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contained the (apparently untrue) statement that

> Summaries of enforcement actions for prior years are included in the FDIC's annual reports, also available from the Corporate Communications Office.

Id. In fact, the annual reports do not contain such summaries; rather, they contain no more than aggregate figures for numbers of enforcement actions undertaken in specified years. See, e.g., id.

[493] In May 1985 the FDIC proposed a policy for publication of names of banks and persons to whom final orders have been issued in bank enforcement actions, together with a description of the nature of the action and a summary of the order. See FDIC Press Release PR-60-85 (May 6, 1985). That proposal was finally abandoned in June 1987. See 1 Malloy, supra note 1 at 493 n. 1. The FDIC recently approved a new policy, however, under which it would seek a commercial publisher for continuing publication of redacted versions of all FDIC Board opinions, as well as ALJ recommended opinions. (Identities of banks and other persons would be removed.) Conversation with Mr. Glancz, supra note 197. An initial publication, covering opinions from 1979 to date, is expected to be available by the beginning of 1988, with subsequent reporters issued on a quarterly basis. Id.

[494] See, e.g., Letter from Marvin H. Morse, Chief Administrative Law Judge, to Marshall J. Breger, Chairman, Administrative Conference of the United States, June 30, 1986, at 3 (confidentiality of enforcement proceedings leaves few systematic opportunities to study the precedents).

to terms with an unusual area of federal law which, because of the use of detailed ALJs, is likely to be outside their immediate and continuing experience.[495]

It is not enough to respond that such "precedents," if relevant, would be made available to counsel in the course of an APA hearing. This leaves too much to chance, in terms of the relative "zeal of counsel for respondents in particular cases through discovery requests."[496] Indeed, such a response is undercut by the realities of the situation of administrative enforcement in this area.

First, discovery practice under a set of regulations that are not detailed in that regard heightens the element of chance. Second, given the fact that most administrative enforcement efforts tend to be resolved by consent or waiver, or through the use of such nonadjudicatory devices as the memorandum of understanding or the formal agreement, as a practical matter it is critical that this body of decisions be publicly accessible before a decision is made by client and counsel whether or not to stand firm and insist upon formal adjudication.

Accordingly, this study recommends that the bank regulatory agencies make available, through regular publication, or similarly accessible means of dissemination, redacted versions of decisions and accompanying orders with respect to formal administrative enforcement adjudications.

B. Publicity of Enforcement Actions

A related issue has to do with the publicity given to administrative enforcement actions. Quite aside from the question of the availability of formal decisions and orders rendered in such actions, there is a need for heightened public awareness of such actions. Even a general awareness of the prevalence and trends in such actions is not promoted by current agency practices. Most of the regulators periodically publish only aggregate data concerning enforcement actions, with very little in the way of useful analytical categorization of the data.

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[495] See id. (detailing of ALJs results in "no aggregation of specialized trial judge expertise").

[496] Id.

One exception in this regard, until recently, has been the practice of the OCC to publish very brief narrative summaries of each administrative enforcement action.[497] Currently, most of these narrative summaries have been reduced, almost to the point of meaninglessness, to an outline of the types of charges involved in each action.[498] (On a more encouraging note is the recent announcement of the establishment of OCC Advisory Letters, which are intended to alert national banks and directors to activities and situations that could contribute to or detract from safe and sound management.[499] Nevertheless, this does not necessarily substitute for regular and informative publicity of enforcement actions.)

One administrative device that might also be usefully exploited in this context is the promulgation of interpretive regulations identifying types of conduct viewed as unsafe or unsound practices by the regulators. Though it is true that the determination of the unsafe and unsound nature of a particular activity or practice is a case-by-case inquiry, nevertheless certain broad categories have in the past exhibited sufficient trending in this regard to be the subject of rulemaking.[500] In the interest of greater public awareness and understanding of enforcement policy, the regulators should be encouraged to use their rulemaking power more frequently in this regard.

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[497] This practice ceased as recently as 1986. Interview with Mr. Fitzgerald, _supra_ note 226. The Fed continues to make such summaries readily available through its annual report on formal enforcement actions.

[498] _See_, _e.g._, 6 OCC _Quarterly Journal_ 81 _et seq_. (1987).

[499] _See OCC Advisory Letters to Alert Bankers and Bank Directors to Activities That Could Contribute to Safe and Sound Bank Management_, [Current Binder] Fed. Banking L. Rep. (CCH) para. 87,077 (September 25, 1987).

Accordingly, this study recommends that the bank regulatory agencies establish systems for the regular and public dissemination of information concerning enforcement policies, both through interpretive rulemaking and through public releases.

C. Effectiveness/Efficiency of Current Arrangements

The current arrangements for the regulatory implementation of the formal enforcement authorities of these regulators does appear to be generally effective, to the extent that practical data is available to assess the effectiveness of these arrangements. The overall substantive consistency in the way in which these authorities have been interpreted and applied, particularly as reflected in the case law, is impressive.

However, there are some obvious inefficiencies in these arrangements. Given that each of the regulators is implementing essentially the same statutory authorities, it is not readily understandable why the procedural regulations should vary to the extent that they do from agency to agency. Admittedly, there are extensive similarities among these regulations, but the significant differences in degree of detail between, on the one hand, the OCC and FHLBB regulations and, on the other, the Fed, FDIC and NCUA regulations does not seem justifiable. Further, all of these regulations are weak on such details as rules of discovery and evidence.

Accordingly, this study recommends that the bank regulatory agencies develop a uniform set of regulations establishing rules for procedure and practice with respect to formal enforcement adjudications, with particular attention to specific rules of pretrial practice, discovery and evidence.

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[500] See note 246, supra.

D. Consolidation/Coordination of Administrative Enforcement Actions

One obvious concern is that since these regulators do not employ and maintain their own ALJs, but rely exclusively on interagency loans of detailed ALJs,[501] the potential for inconsistency in procedure and in decisions is heightened. In addition, concerned staff of the regulators have expressed the related concern that the used of detailed ALJs increases the potential danger that sophisticated regulatory issues and concerns will be submitted, in the first instance, to an inexperienced or uncertain presiding officer.[502]

There are a number of ways in which these concerns could be addressed. One alternative would be for the agencies to employ their own ALJs, as in fact literally contemplated by federal law.[503] The problem is that there does not appear to be sufficient adjudicatory traffic at any of the agencies to justify such an ongoing arrangement for individual agencies.[504]

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[501] See Letter from Judge Morse, supra note 494 at 3.

[502] See, e.g., Interview with Mr. Fitzgerald, supra note 212; Interview with Mr. Jones, supra note 226; Interview with Mr. Fenner, supra note 212.

[503] See 5 U.S.C. 3105: "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [id. §§] 556 and 557. . . ." (Emphasis added.)

[504] This was the view repeatedly expressed by regulatory staff. See Interview with Mr. Fitzgerald, supra note 212; Interview with Michael Bradfield, General Counsel, Fed, April 24, 1987; Interview with Mr. Jones, supra note 226; Interview with Mr. Fenner, supra note 212. However, in calculating the amount of adjudicatory traffic, it should be kept in mind that an ALJ may have been assigned to a particular action even though it is eventually resolved by a consent order and never goes to an APA hearing. Thus, the FDIC has obtained 72 details of ALJs in FY 1984, 132 in FY 1985 and approximately 150 in FY 1986. See data included with Memorandum from Craig Pettibone, Assistant Director, OPM,

The other alternative would be for the agencies to establish a permanent pool of ALJs from which all of them could draw as necessary. Two problems arise in this regard. First, even with pooling there may not be sufficient traffic to justify the maintenance of the pool, although this is less compelling on the available data than it would be with respect to maintenance of ALJs individually by each agency. Second, it is not clear from the statutory provisions governing ALJs whether a group of agencies, rather than "each agency,"[505] would be authorized to maintain such a pool. One way to meet this objection would be to have the pool employed by a pool bank regulatory agency,[506] with detailing to each participating agency as needed.

Currently OPM operates a reimbursable ALJ loan program under which ALJ's from the NLRB have been loaned to the banking agencies on a continuing, year-to-year basis.[507] While the same ALJ personnel tend to

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to Professor Michael P. Malloy (October 28, 1987). Similarly, the OCC obtained 50 details in FY 1984, 102 in FY 1985 and approximately 136 in FY 1986. See id.

[505] See note 503, supra.

[506] One possible candidate for pool agency under this alternative proposal might be the Federal Financial Institutions Examination Council ("FFIEC"), established under 12 U.S.C. § 3303. However, it is not clear that FFIEC is an appropriate "agency" for purposes of 5 U.S.C. § 3105, nor is it certain that this pooling function is within the functions of FFIEC currently contemplated by statute. See 12 U.S.C. § 3305. Staff of the Office of Administrative Law Judges, OPM, have informally expressed similar reservations about the status of FFIEC for these purposes. Interview with Craig B. Pettibone, Assistant Director, OPM, October 28, 1987.

[507] Interview with Mr. Pettibone, supra note 506. See also Memorandum from Mr. Pettibone to Chief Administrative Law Judges, September 19, 1986.

continue to serve the same borrowing agencies,[508] attrition in the ranks of ALJ personnel[509] could create some discontinuity for the banking agencies. In any event, this ad hoc, year-to-year arrangement does not seem to address adequately the continuing needs of the banking agencies under their permanent statutory authority.[510]

Accordingly, this study recommends that the bank regulatory agencies are urged to consider, in consultation with the Office of Personnel Management, the development of an appropriate permanent pooling arrangement, through administrative action or amendment of pertinent statutory authority, for the employment of administrative law judges, to be available to each pool participant as necessary for proceedings required to be conducted in accordance with 5 U.S.C. §§ 556-557.

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[508] Interview with Mr. Pettibone, _supra_ note 506.

[509] _See_ Memorandum from Mr. Pettibone, _supra_ note 507.

[510] This was the initial view expressed by staff of several of the agencies concerned. _See_ Interview with Mr. Fitzgerald, _supra_ note 212; Interview with Mr. Jones, _supra_ note 226; Interview with Mr. Fenner, _supra_ note 212.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
STATEMENT 12

ADMINISTRATIVE MECHANISMS FOR RESOLVING FREEDOM OF INFORMATION ACT DISPUTES

by

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Summary

This study evaluates the desirability and feasibility of establishing an administrative mechanism for resolving Freedom of Information Act disputes. It is presented in three parts. The first part describes briefly the existing dispute resolution structure and presents statistical data reflecting its operation. The second part reports in narrative form the results of informal interviews with a large number of individuals from widely-differing perspectives who have substantial experience in this field. The third part presents an analysis of the study data and identifies the principles that should govern consideration of any change in the present dispute resolution structure. It then presents an administrative tribunal model that illustrates how the present structure might be modified to create on balance a more effective system. The study recommends that an independent administrative structure along the lines of the model be established to divert as many cases as practicable from the now exclusive *de novo* federal court process into a system tailored to the needs of access dispute resolution. Alternatively, the study considers and recommends the implementation of a form of the ombudsman model to ameliorate the burdens of an exclusively judicial dispute processing system without affecting the availability of court review.

I. INTRODUCTION AND OVERVIEW OF THE CURRENT STRUCTURE FOR ACCESS DISPUTES RESOLUTION

A. Background

Of the generally-applicable statutes governing federal administrative practice, none has rivaled the Freedom of Information Act (FOIA)[1] as a source of controversy or target of reform in recent years.[2] The Act's basic command that any non-exempt agency record be made available to any person upon request has spawned a complex and intricate body of law and a multi-level decisional process culminating in a de novo proceeding in federal district court.[3] Most of the policy controversy has focused on the substance of particular exemptions and certain agency practices in administering the Act.[4] Little attention has been given to the question of how exclusive reliance on court enforcement has affected the overall administration of the statute.

From time to time, informal proposals have been made that an administrative tribunal be established to resolve FOIA and other public access disputes.[5] Interest in the possible use of an administrative structure stems largely from three concerns with long-standing reliance on federal court adjudication in these cases. These concerns are (1) delay, (2) cost and (3) quality of decisionmaking.[6] A central objective of this study has been to determine whether these or other related concerns are well-founded. It has also been an aim of this study to assess whether, to the extent these concerns are well-founded, an administrative structure could be expected to relieve them significantly and, if so, what form it should take.

These are complex and important questions, but ones for which there is little hard data. They are also questions, which if not confined through the drawing of somewhat arbitrary lines, would tend to reach into every aspect of federal access law. For these reasons, it necessary to mark clearly at the outset the scope of this study. First, the study is not a reaction to any particular proposal that has been advanced. It addresses the concept of using an administrative structure. Second, it accepts as a given the substantive provisions of current law and does not address pending legislation, which in any event is generally unrelated to the issue of dispute processing.[7] Third, it assumes that any reasonable enforcement structure would include requirements for agency processing similar to those provided by current law and that the tribunal would act formally, if at all, only after agency disposition of a matter. Thus, it does not independently address agency case processing, but instead focuses on dispute processing after agency action. Finally, while the study uses access disputes under the Freedom of Information Act as the model for analysis, access disputes under the Privacy Act,[8] are generally affected by the same considerations and may be amenable to the same treatment.[9]

B. The Current Process

FOIA establishes a two-tier process for agency decision-making. Within ten working-days of a request for records, an agency is required to determine whether to comply with the request and to notify the requester of the determination, the reasons therefor, and the right of the requester to appeal to the head of the agency any adverse determination.[10] If an appeal is taken, the agency head is required, within twenty working-days, to determine the appeal and notify the requester of the decision.[11] If on appeal, the initial denial of records is upheld in whole or in part, the agency is further required to notify the requester of the provisions for judicial review under the Act.[12]

In "unusual circumstances," the statutory time limits may be extended by written notice from the agency to the requester for a period not to exceed ten working-days.[13] Such circumstances are defined in the Act as:

> (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
>
> (iii) the need for consultation ... with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.[14]

A requester is deemed to have exhausted his administrative remedies with respect to a particular request if the agency fails to comply with the time limits, including any proper extension of time.[15]

Upon receipt of an agency denial on appeal or after having exhausted his administrative remedies, a requester may pursue his request for the records through a civil action in federal district court.[16] The court is required to determine the matter *de novo* and the burden is upon the agency to sustain its action.[17] The court may examine the contents of the agency records *in camera*.[18] If the court determines that any record or part thereof has been improperly withheld, it is authorized to order its disclosure.[19] The court may also assess against the United States reasonable attorney fees and other litigation costs in an action in which the requester has substantially prevailed.[20]

The venue provision of FOIA permits the action to be brought in the district court "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia."[21] The government is given 30 days, rather than the usual 60, to answer the complaint.[22] The court may, "if good cause therefor is shown," expedite the case on the docket.[23] In cases that reach litigation before a final agency determination on appeal, the effect of the Act's constructive exhaustion provision is limited by a further provision authorizing the court to retain jurisdiction while allowing the agency additional time to complete its review of the records in "exceptional circumstances" and where the agency is exercising "due diligence" in responding to the request.[24] A leading Court of Appeals decision[25] construing this provision holds that generally an agency should be deemed to be exercising "due diligence" if it is processing requests in the order in which it receives them and is not "lax overall in meeting its obligations under the Act with all available resources."[26] Thus, unless a requester can show "exceptional need or urgency,"[27] the judicial proceeding will normally be stayed until agency processing has been completed.

The most distinctive feature of FOIA litigation is that the agency seeking to withhold requested records has full knowledge of their content and the requester does not. Thus, the statutory question of whether or not the record is exempt can never be subject to adversarial testing in the purest sense. The Act responds to this problem by authorizing the district court, as noted above, to examine the disputed records in camera.[28] Yet as the Court of Appeals observed in Vaughn v. Rosen,[29] the leading case addressing this procedural dilemma, the solution is limited at best:

> ...Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

* * *

> Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible.[30]

The court's solution was to require the agency to prepare an index of the withheld records, correlating the records or portions thereof with specific exemptions and the agency's justification for nondisclosure.[31] The court required that the index be as detailed as possible without disclosing the information sought to be withheld. Subsequent cases have indicated that the "degree of specificity of itemization, justification, and correlation required in a particular case will depend on the nature of the document at issue and the particular exemption asserted."[32] The preparation and submission of some form of a Vaughn index has now become a critical procedural component of most FOIA litigation.

FOIA cases are commonly adjudicated by summary judgment.[33] Discovery is relatively restricted.[34] Summary judgment is normally based upon the pleadings and the affidavits in the form of Vaughn indices.[35] Where discovery against the government is used, it is generally taken after the submission of the Vaughn index to pursue issues raised by that document.[36] In some circumstances, discovery may be had against the requester.[37] Whether adjudicated by summary judgment or otherwise, a court order requiring disclosure will ordinarily be stayed if the government appeals.[38] On appeal, the court reviews the factual basis for the district court's determination and decides whether it was "clearly erroneous."[39]

While the foregoing description of the current FOIA structure focuses, as does most commentary,[40] on the agency process, this study primarily addresses the method for processing disputes that persist after final agency action. Yet it proceeds with an awareness that any extra-agency dispute processing mechanism can have an effect, direct or indirect, on the agency process itself. The focal point for the study is nevertheless that pool of cases either that have moved through both the initial and appeal stages of the agency FOIA process and remain in dispute because the request has not been fully granted or that have not yielded an agency decision within the time periods provided for in the Act. Under FOIA, the cases in either group become subject to the de novo proceeding in federal district court.[41]

C. The Caseload and Case Processing

As an initial matter it is helpful to have a general sense of the dimensions of the FOIA caseload. Public perceptions of the caseload are closely tied to the dramatic increase in FOIA litigation following the 1974 Amendments.[42] It is less widely understood that case volume appears to have peaked roughly between 1979 and 1980. Since that time, the caseload has remained relatively constant. While this apparent leveling trend is contrary to the common perception that the volume of cases in litigation continues to increase, it nevertheless reflects a substantial and persistent caseload.[43]

1. The District Court Caseload

In the period since 1979, the number of FOIA cases filed and terminated in the federal district courts were as follows:[44]

Year	Filed	Terminated
1980	627	558
1981	507	530
1982	381	450
1983	454	429
1984	479	466
1985	565	573
Total	3013	3006

New case filings thus average slightly over 500 per year. Filings and terminations for the overall period are almost precisely balanced, indicating the absence of a developing backlog. Yet the size and persistence of the caseload make it a prominent component of the federal court dockets. In the United States District Court for the District of Columbia, the most common forum for these actions, FOIA cases account for roughly 12% of the civil actions filed in which the United States is a party.[45]

The concentration of the actions in the District of Columbia is another distinctive feature of the FOIA caseload. For the six-year, post-1979 period, the percentages of FOIA cases filed in the District of Columbia were as follows:[46]

Year	Total Filings	D.C. Filings	Percent
1980	627	218	34.8
1981	507	209	41.2
1982	381	171	44.9
1983	454	199	43.8
1984	479	190	40.0
1985	565	235	41.6

Because roughly 40% of all FOIA actions are filed in the D.C. district court, the case processing statistics, as well as the general development of FOIA caselaw, are heavily influenced by this court.[47]

For the purposes of this study, the most significant case processing statistics are those which reflect the time intervals from filing to disposition in FOIA cases. The tables below show the median time in months and the range for the middle 80% of the cases terminated in the six-year, post-1979 period. The first table is for all district courts, including the district court for the District of Columbia.[48] The second is for the District of Columbia alone:[49]

ALL DISTRICT COURTS

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	558	530	450	429	466	573
10% Less Than	2	2	2	2	2	2
Median	7	8	10	8	7	8
10% More Than	21	23	31	33	26	54
NO COURT ACTION						
Number of Cases	224	191	149	143	181	270
10% Less Than	2	1	2	1	1	1
Median	6	5	7	6	5	6
10% More Than	19	19	28	29	25	57
BEFORE PRETRIAL						
Number of Cases	278	281	259	239	250	273
10% Less Than	2	2	3	2	3	3
Median	8	9	11	9	8	9
10% More Than	18	23	30	33	22	54
DURING OR AFTER PRETRIAL						
Number of Cases	46	41	30	41	30	24
10% Less Than	5	3	6	4	4	4
Median	12	8	16	13	15	14
10% More Than	27	24	42	37	38	29
TRIAL						
Number of Cases	10	17	12	6	5	6
10% Less Than	1	8	2	6	*	*
Median	11	16	13	9	*	*
10% More Than	27	32	21	12	*	*

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	214	221	188	180	178	211
10% Less Than	2	2	2	1	2	1
Median	6	6	8	7	6	7
10% More Than	15	20	29	29	19	22
NO COURT ACTION						
Number of Cases	88	92	61	66	74	103
10% Less Than	2	1	2	1	1	1
Median	5	4	6	5	5	4
10% More Than	14	19	23	29	19	24
BEFORE PRETRIAL						
Number of Cases	115	118	125	109	99	100
10% Less Than	2	3	3	2	3	3
Median	8	8	9	9	7	8
10% More Than	16	22	30	29	20	20
DURING OR AFTER PRETRIAL						
Number of Cases	10	8	1	4	4	8
10% Less Than	4	6	*	1	*	*
Median	10	7	*	4	*	*
10% More Than	25	15	*	14	*	*
TRIAL						
Number of Cases	1	3	1	1	1	*
10% Less Than	1	1	*	1	*	*
Median	2	15	*	11	*	*
10% More Than	2	16	*	11	*	*

For all courts, the median processing time over the period ranged from 7 to 10 months; for the D.C. district court it ranged from 6 to 8 months. The time interval is, of course, lower for cases that were terminated without court action. In these cases, which account for roughly 40% of the total cases, the median times for all courts ranged from 5 to 7 months and for the D.C. district court ranged from 4 to 6 months. Correspondingly, the time interval is higher in cases that received court action. The largest category of these cases--those terminated before pretrial--constitute roughly 50% of the total cases. In these cases the median time for all courts ranged from 8 to 11 months; for the D.C. district court, from 7 to 9 months. In the relatively few cases that were not terminated until or after pretrial, the median time for all courts ranged from 8 to 16 months; in the D.C. district court median time ranged from 2 to 15 months, but is not computed for some years because the number of cases is so small. Notably, while roughly 7% of the cases for all courts were not resolved until this stage, in the D.C. district court less than 3% of the cases reached this stage. Finally, in the category of cases that reached trial the median time was not computed for the entire period because the number of cases was so small--less than 2% in all courts.

Because the vast majority of FOIA cases are settled or are decided on summary judgment, time intervals in the first two categories are most important.[50] From the median intervals in these categories, some extremely general observations can be made. In neither category are any trends perceptible over the six-year period. The time intervals are neither increasing nor decreasing. Most cases are terminated within 6 to 9 months. Cases that are decided on motion typically take a few months longer than settled cases. Cases in the D.C. district court are normally terminated somewhat more expeditiously when compared to terminations by all courts. Similarly, a somewhat larger percentage of D.C. cases are terminated before pretrial. These observations, however, are based exclusively on the median statistic. Consideration of the range of the time intervals for the middle 80% of the cases presents a more complex picture.

For all courts, the range of the middle eighty percent for all cases varied from a low of 2 to 21 months in 1980 to a high of 2 to 54 months in 1985. Apart from the range in 1985 (which appears to be an aberration), the range was relatively stable over the six-year period, averaging 2 months at the low end and approximately 27 months at the high end. From the available statistics it is not possible, however, to determine how evenly the cases are distributed in the middle eighty-percent range.[51]

The ranges in the middle eighty percent for cases terminated with no court action or on motion were quite similar and were only slightly narrower than the ranges for all cases. Cases terminated with no court action averaged at the lower end of the range one and one-third months and averaged at the upper end of the range (again excluding the aberrational year) 24 months. Cases terminated with court action before pretrial (presumably on motion) averaged at the lower end of the range two and one-half months and averaged at the upper end of the range (excluding the aberrational year) 24 months. Cases terminated during or after pretrial averaged at the lower end of the range four and one-third months and averaged at the upper end of the range just under 33 months. For the relatively small number of cases terminated at or after trial, the ranges were higher and more varied.

For the District of Columbia, the ranges for the middle eighty percent were somewhat lower and narrower. For all cases, the range averaged at the lower end one and one-third months and at the upper end just over 22 months. Because the cases terminated in the District of Columbia with no court action or on motion before pretrial constituted 96.5% of all cases for that court, the averages of the high and the low ends of the ranges over the six-year period in these two categories were virtually identical with the average ranges for all cases. For the same reason, the median and range for most years is not computed for cases terminated at or after pretrial or trial.

The middle eighty percent of cases for both all courts and the District of Columbia reflect a substantially larger spread between the median and the higher end of the range than the median and the lower end. Stated differently, the variability in the time from filing to termination for the slower half of the cases was notably greater than for the faster half of the cases. As noted earlier, the distribution of the cases above and below the median is not available. Assuming a generally normal distribution, however, there would be large numbers of cases well in excess of the median.[52] Thus, for the total number of cases for all courts over the six-year period, if the cases are normally distributed, a relatively large number of cases will be well above the median of eight months but somewhat below the 27 month average at high end of the middle eighty percent. Without making any assumption as to distribution, the most that can be said is that eighty percent of cases above the median fall in the 8 to 27 month range.

The most distinctive feature of FOIA litigation is the high proportion of cases that are settled or are decided on summary judgment. The following table reflects the procedural progress at termination for all cases terminated in the six-year, post-1979 period:[53]

PROCEDURAL PROGRESS AT TERMINATION

	1980	1981	1982	1983	1984	1985
Before Issue Joined	100	76	58	71	81	118
Motion Decided But Before Issue Joined	93	75	63	75	69	55
Issued Joined, No Other Court Action	121	114	90	70	97	132
Issue Joined, After Judgment of Court On Motion	186	206	196	164	183	236
Issue Joined After Pretrial But Before Trial	46	41	30	41	29	24
During Court Trial	2	3	0	1	0	1

During Jury Trial	0	0	0	0	0	1
After Court Trial	8	13	12	5	5	4
After Jury Trial	0	1	0	0	0	0
Other	2	1	1	2	2	2
TOTAL	558	530	450	429	466	573

While there is some variation in the proportion of cases terminated in particular categories over the six-year period, it is relatively insubstantial. Clearly, there are no trends in any of the categories over the period. Of the 3006 cases terminated in this period, approximately 92% were terminated before pretrial. Only 7% of the cases reached pretrial. And roughly only 1% of the cases were tried. The procedural progress at termination statistics for FOIA cases do not, however, vary widely from the corresponding statistics for all civil cases.[54]

The distinguishing feature of FOIA litigation is demonstrated more clearly through statistics reflecting the nature of the disposition of the actions. The following table reflects the nature of the disposition in all FOIA cases terminated in the six-year, post-1979 period:[55]

DISPOSITION OF ACTION

	1980	1981	1982	1983	1984	1985
Transfer	29	13	6	10	4	11
Remand	3	1	1	1	0	1
Dismissed, Want of Prosecution	19	8	22	11	16	15
Dismissed, Discont'd, Settled, Withdrawn	230	259	199	215	246	360
Judgment on Default	1	0	0	0	1	0
Judgment on Consent	9	6	5	7	2	7
Judgment on Motion Before Trial	253	224	204	177	182	170
Judgment on Jury Verdict	0	1	0	0	0	0

Judgment on Directed Verdict	0	0	0	0	0	1
Judgment on Court Trial	10	13	11	5	4	5
Other	4	5	2	3	11	3
TOTAL	558	530	549	429	466	573

As with the procedural progress data, there is some variation over the period, but no trends are discernible. Of the 3006 FOIA cases terminated in the period, 1548 or 52.0% are reflected in the "dismissed-settled-withdrawn" category. This percentage is somewhat higher than the roughly 48% of all civil cases that fall into this category.[56] Far more importantly, the category "judgment on motion" reflects 1210 cases or 40.3% of the cases for the period. This proportion is significantly higher than the corresponding proportion of 16.5% for all civil cases in this category.[57] Thus, for FOIA cases that are not settled, disposition by summary judgment is clearly the norm.

The final available data useful in obtaining a general overview of judicial case processing in FOIA matters identifies the party for whom judgment was rendered. The following table reflects this data for all cases terminated in the six-year, post-1979 period:[58]

JUDGMENT FOR

	1980	1981	1982	1983	1984	1985
Plaintiff	37	27	22	30	23	17
Defendant	242	214	197	166	146	139
Both	14	24	24	9	11	8
Unknown	275	265	207	223	286	409
TOTAL	568	530	450	428	466	573

Of the total 3006 cases terminated in the period, the party for whom judgment was rendered is identified in only 1350. Of the remaining 1656 cases, or 55.1% of the total, the designation is "unknown." These cases primarily represent those in which no judgment was rendered.[59] For the 1350 or 44.9% of cases in which there was a judgment, the judgment was for the plaintiff in only 156 or 11.6% of the cases. Judgment was for the defendant in 1104 or 81.8% of the cases and for "both" parties in 90 or 6.7%. While there is a continuous decline over the period in the absolute number of cases in which judgment was for the defendant, the percentage those cases represent of the total number of cases in which a judgment was rendered remained constant. No other trends are apparent.

2. The Appellate Caseload

The appellate FOIA caseload is only a small fraction of the total district court caseload. The table below reflects the number of cases and median time intervals in months for all FOIA appeals terminated after hearing or submission in the six-year, post-1979 period:[60]

APPELLATE TIME INTERVALS/ALL CIRCUITS

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	36	72	59	38	50	49	304
From Filing Notice to Filing Last Brief	5.9	5.4	5.2	4.5	4.6	4.5	
From Filing Last Brief to Hearing or Submission	1.7	1.9	2.8	2.4	2.8	2.8	
From Hearing or Submission to Final Disposition	1.0	1.8	1.3	1.7	2.3	1.5	
From Filing Notice of Appeal to Final Disposition	11.0	10.4	10.3	9.8	10.2	10.5	
From Filing in Lower Court to Final Disposition in Appellate Court	21.8	22.5	25.3	25.5	22.0	22.8	

These 304 cases represent approximately 10% of the 3006 cases terminated in the district courts in this period. Of the 304 cases, 137 or 45.1% were terminated in the Court of Appeals for the District of Columbia Circuit. From the filing of the notice of appeal to final disposition, the median time for all circuits over the six-year period ranged from 9.8 to 11.0 months. In the District of Columbia Circuit, this interval ranged from 9.2 to 11.6 months. For all circuits, the median time from the filing of the original district court action to final appellate disposition ranged in this period from 21.8 to 25.5 months. For the District of Columbia Circuit, this interval ranged from 21.8 to 25.8 months. Over the period, no trends are apparent for either all circuits or the District of Columbia Circuit in particular.

For the same six-year period, the following table reflects the nature of the disposition and reversal rate in all FOIA appellate cases terminated after hearing or submission:[61]

APPEALS DISPOSED OF AFTER HEARING OR SUBMISSION

	1980	1981	1982	1983	1984	1985
NUMBER OF CASES	59	67	58	37	47	44
AFFIRMED OR GRANTED	26	48	39	29	33	31
DISMISSED	--	--	1	--	3	1
REVERSED OR DENIED	12	11	15	7	11	8
OTHER	6	8	3	1	--	4
PERCENT REVERSED	20.3	16.4	25.9	18.9	23.4	18.2

Over this period, the reversal rate ranged from 16.4% to 25% and averaged 20.5%. While these rates cannot readily be correlated with the "judgment for" table set out earlier, assuming the district court judgments "for the plaintiff" and "for the defendant" are appealed proportionately, a high proportion of the reversals are in cases in which the government prevailed in the district court. In this same period the reversal rate for all civil appeals terminated after hearing or submission ranged only from 18.4% to 19.3%.

3. The Government-Wide Agency Caseload

To complete this statistical overview, it remains only to describe the nature and extent of the government-wide FOIA caseload with the potential for becoming subject to post-agency dispute processing. For at least two important reasons it is not possible to present an entirely meaningful statistical picture of the total agency FOIA caseload. First, the statutory reporting provisions of FOIA do not require agencies to report the total number of requests received.[62] Second, among the agencies that voluntarily report this statistic there are no uniformly-applied principles for identifying requests for information as "FOIA" requests, and often routine provision of information inflates the reported statistic.[63] These deficiencies in the available data, however, do not pose a serious problem for identifying the portion of the total caseload that may remain in dispute after final agency processing.

Agencies are required to report the number of requests that are denied by application of one of the Act's nine exemptions.[64]

These cases are reported separately from those requests denied either because the records do not exist or for procedural reasons.[65] Also, the number of these cases appealed after initial denial and the number of these appealed denials granted in full is separately reported.[66] By subtracting the number of appeals granted in full from the total number of appeals, one obtains (subject to one qualification noted below) the number of cases which may remain in dispute after agency processing.

Focusing on appeals rather than initial requests appears sound, as well as convenient. Regardless of the number of total requests, the simplicity and low cost of an appeal--merely the posting of a letter--coupled with the statutory requirement for providing notice to the requester of the right of appeal make it reasonable to assume that virtually any requester with any serious disagreement or dissatisfaction with the initial agency disposition will appeal. Ungranted appeals (ungranted in full or in part) may, thus, with some confidence be said to include all cases in which a requester remains unsatisfied after a final agency disposition.[67]

For the three most recent calendar years for which this data is available, the table below summarizes the appeal statistics compiled from the reports of the twenty-eight agencies reporting the largest number of exemption-based denials:[68]

EXEMPTION BASED DENIALS AND APPEALS

	1982	1983	1984	Total
Exemption-Based Denials	32,689	33,207	35,451	106,445
Appeals of Exemption Based Denials	5,420	5,098	5,050	15,568
Appeals Granted In Full	431	305	332	1,068
Appeals Denied In Full	1,950	1,749	1,539	5,238
Appeals Denied In Part	1,028	1,125	1,069	3,222

Over the three year period, 15,568 or 14.6% of the total 106,445 exemption-based denials were appealed. Of these appealed denials, 1068 or 6.9% were granted in full, leaving 14,494 or an average of 4831 cases per year that had the potential for dispute after the disposition of the agency appeal. It should be noted, however, that the number of appeals disposed of in each year is less than the total number of appeals for that year. This difference reflects appeals not disposed of in the calendar year in which they were received and is also affected by the inclusion of dispositions of appeals filed in prior years. Nevertheless, even if the total number of appeals from exemption-based denials is used instead of the smaller number that excludes appeals granted in full, the total number is 15,568 or an average of 5189 cases per year. By either method the number of cases annually with potential for further dispute processing is roughly 5000.[69]

4. Summary

It is not possible to capture the complete picture of FOIA case processing with only numbers. And to undertake to summarize the many statistics presented here poses the additional risk of over-generalization. Nevertheless, it seems useful to attempt to draw together the basic data.

Of the roughly 5000 FOIA cases with the potential for further processing after final agency disposition, approximately 500 lead to suits under the Act in federal district court. These cases are disposed of by the courts in a median time of roughly 8 months. For the faster half of the middle eighty percent of the cases, the time to disposition ranges from 2 to 8 months; for the slower half of the middle eighty percent, the time ranges from 8 to 27 months. Of the roughly 500 cases annually, approximately 40% are brought in the District Court for the District of Columbia and move somewhat more quickly to disposition. For all courts, approximately 52% of the cases are settled or otherwise dismissed at an early stage in the proceeding; and approximately 40% are disposed of by summary judgment. Only roughly 1% of the cases are tried. The government prevails in just under 82% of the cases for which a judgment is recorded. Approximately 50, or 10% of the 500 cases lead to appeals to a United States Courts of Appeals requiring disposition on the merits. Of these, the median time from filing to disposition is roughly 11 months; the reversal rate is approximately 20% and just over 45% are filed in the District of Columbia Circuit.

D. Existing Non-Judicial Compliance Mechanisms

Under FOIA, after final agency denial, the only formal mechanism for relief for a requester is the federal district court action. Other less case-specific mechanisms for promoting agency compliance do, however, exist. Their presence and operation becomes part of the milieu in which individual disputes are decided and some awareness of their role is helpful in understanding the overall issues of the study.

1. Congressional Committees

The committees of Congress with oversight responsibility in the FOIA area have traditionally taken a close interest in case processing at the agency level, apart from their more general concern with legislative policy matters in the access field.[70] The case processing reports required by the Act to be filed with Congress are maintained by the Subcommittee on Government Information, Justice and Agriculture of the House Committee on Government Operations and the Subcommittee on the Constitution of the Senate Judiciary Committee. The staffs of the committees review these reports and make follow-up inquiries to the agencies. These committees, as well as individual members of Congress, also receive case-specific complaints in the FOIA area, which are handled in a manner similar to other constituent inquiries. Through these and other more traditional oversight functions, the agencies are made aware that their overall case processing activities are subject to continuing congressional scrutiny. Nevertheless, the cases that remain in dispute after agency processing and become subject to litigation would rarely benefit directly from this process.

2. Department of Justice

Such cases are more likely to be influenced by the work of the Department of Justice. In part out of its general role as legal counselor to the agencies and in part out of its responsibility for defending agencies in FOIA litigation, Justice serves, to a limited degree, as a centralized compliance authority.[71] For over ten years, there existed within the Department a Freedom of Information Committee made up of representatives from the counseling and litigating divisions.[72] The Committee's function was to review informally proposed agency final denials under the Act as a precondition to the Department's defense of those actions should litigation ensue.[73] It also became used by the agencies as a source for informal FOIA advice.[74] As the relationship between Department's litigation function and the development of FOIA policy came to be better understood, the Department's compliance role became more formalized. The 1974 amendments to the Act explicitly recognized this function by requiring the Attorney General to report annually to Congress the details of FOIA litigation and "a description of the efforts undertaken by the Department to encourage agency compliance" with the Act.[75] In the exercise of this responsibility, the Department took the position in 1977 that it would not defend FOIA cases unless the claim of exemption could be supported by a showing of "demonstrable harm" to the government.[76] This policy was revoked in 1981 by a policy which now provides that the Department will defend:

> all suits challenging an agency's decision to deny a request submitted under the FOIA unless it is determined that: (a) the agency's denial lacks a substantial legal basis; or (b) defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records.[77]

The Department continues to exercise its counseling function, now through the Office of Information and Privacy, a component of the Office of Legal Policy. Apart from collecting and maintaining compliance data and giving case-specific advice, OIP formulates and disseminates to the agencies general guidance on the administration of the Act.[78]

3. Information Security Oversight Office

In one category of cases--those involving classified national security information--there is a somewhat different case processing opportunity, although large numbers of cases in this category follow the standard FOIA process. Under the series of executive orders governing national security classification, the current being E.O. 12356, a requester can seek agency review of classified records for possible declassification.[79] A declassified document may, however, still be subject to other FOIA exemptions.[80]

The process is used primarily by academic researchers interested in older records.[81] For the fiscal year 1984, 4,650 such requests for review were filed and 4,401 requests were acted upon.[82] Of the latter, 51% were granted in full, 40% were granted in part and 9% were denied in full. These cases consisted of over 100,000 documents comprising a total of more than 400,000 pages of records. Under a predecessor executive order, E.O. 11652, denials in the mandatory review process could be appealed to an interagency body known as the Interagency Classification Review Committee (ICRC) which had authority to order declassification.[83] The appeal function performed by the ICRC under E.O. 11652 is now performed by the Information Security Oversight Office (ISOO) under E.O. 12356 for presidential papers and records only.[84] The ISOO, an administrative component of the General Services Administration that receives its policy direction from the National Security Council, is also empowered to consider and act on complaints that other information is improperly classified.

4. Office of Special Counsel--Merit Systems Protection Board

A provision of the Civil Service Reform Act of 1978[85] provides one other case-specific, non-judicial mechanism for requester relief in a FOIA case. This provision authorizes the Special Counsel of the Merit Systems Protection Board to "conduct an investigation of any allegation concerning-- arbitrary or capricious withholding of information prohibited under [FOIA], except that the Special counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counter-intelligence information the disclosure of which is specifically prohibited by law or Executive Order."[86] The Special Counsel has no authority, however, to order disclosure of withheld records. This authority is distinct from the duty imposed upon the Special Counsel by FOIA to determine whether disciplinary action is warranted in cases in which a court makes a finding of an "arbitrary or capricious" withholding of records.[87] The investigatory power of the Special Counsel, assigned along with more traditional civil service-related functions, has not been prominently exercised.[88]

5. Office of Management and Budget

Less case-specific, but nonetheless important, is the authority of the Office of Management and Budget (OMB) to provide guidelines for and oversight of agency implementation of the Privacy Act.[89] Exercise of this authority has drawn OMB into issues of access policy not only under the access provisions of the Privacy Act, but also under FOIA because of the inter-relationship between the two statutes. It also stands as a limited experiment with the concept of using centralized authority to formulate and implement information policy.[90] In the latter regard, the broad information management authority granted OMB in 1980 under the Paperwork Reduction Act[91] may prove to be especially important. At the present time, however, the effect of that grant of authority on the processing of information access disputes is unclear.[92]

6. Summary

Neither individually nor collectively do the public access functions of the entities briefly described here represent a comprehensive scheme for effecting access dispute resolution short of judicial proceedings. They do reflect, however, long standing recognition of the possible value of non-judicial mechanisms.

E. Comparative Administrative Structures for Access Dispute Resolution

Reliance upon the courts for the resolution of access disputes is common under state law, as well as foreign law. In two states, Connecticut and New York, and Canada, a country that drew heavily upon the American experience in enacting its own information access law, significant reliance is also placed on administrative structures. The approaches of New York and Connecticut as well as that of Canada, though based in circumstances that differ widely from the U.S. system, provide some useful comparative insight.

1. Connecticut

Under the Connecticut access laws a Freedom of Information Commission is established to adjudicate appeals from denials of information by state and local government agencies.[93] The Commission also possesses the power to issue advisory opinions and impose civil penalties upon agency officials.[94] The Commission's adjudicatory power is exercised through the conduct of relatively informal hearings at which the parties may present evidence and examine and cross-examine witnesses.[95] A single member of the Commission presides at the hearing and issues a initial decision consisting of findings of fact and law which is reviewable by the full Commission, but only on the record built at the hearing.[96] Commission decisions are subject to limited review in state court.[97]

The Commissioners are appointed by the Governor for staggered terms and are removable only for cause.[98] The Commission is directed by statute to hold a hearing within 20 days of a notice of appeal and decide the appeal within 30 days of the hearing.[99] Generally, the time required to adjudicate a case from the filing of an appeal to the final order is two and one-half months, or roughly three weeks beyond the time contemplated by the statute.[100] Judicial review of the Commission's order can extend the delay.[101] The cases are, however, given docket priority, and the Commission usually issues a stay of its order pending appeal.[102] The Commission does not review agency records *in camera*, and instead relies upon witness characterization and indices.[103] While the primary activity of the Commission is adjudication, it has used its other powers to influence agency practice and procedure.[104]

2. New York

The New York Committee on Open Government stands in sharp procedural contrast to the Connecticut Commission. It has no investigatory or adjudicatory power. Its function is exclusively advisory.[105] The Commission is required by statute to give any person (including state and local government officials) an advisory opinion regarding the state freedom of information law.[106] It can issue its opinion orally or in writing, and bases its opinion on the characterization of the circumstances given by the person requesting the opinion.[107]

The advisory opinions operate, in effect, to place the Committee in an ombudsman role in access disputes.[108] The advisory opinion can from the outset influence the agency decision and, in cases in which the initial agency denial is appealed, the Committee is formally given an opportunity to comment on the appeal prior to the agency decision.[109] The Committee's opinions are also given weight by the courts in interpreting the freedom of information statute.[110] The influence of the Committee's opinions is further enhanced by their careful indexing and wide distribution.[111]

Some members of the Committee are appointed by the Governor, some by the Legislature, and some serve by virtue of governmental position.[112] The members of the Committee serve part-time and the staff of the Committee is headed by an Executive Director who serves at the pleasure of the Secretary of State.[113] While the administration of the New York freedom of information law, like FOIA, is based primarily upon agency case processing and judicial review, the ombudsman role of the Committee significantly augments the dispute resolution process.[114]

3. Canada

The Canadian Access to Information Act establishes the Information Commissioner as an officer of Parliament.[115] Any individual denied access to information by an agency under the Act can complain to the Commissioner.[116] The Commissioner is authorized to conduct an investigation of the matter complained of, and if the complaint is determined to be well-founded the Commissioner provides a copy of the investigative report to the agency head along with a recommendation for action.[117] The agency is then given an opportunity to reply by informing the Commissioner of any action taken or proposed or of the reasons for taking no action.[118] The Commissioner then reports the result to the complainant.[119]

Proceeding through the Commissioner is a prerequisite to bringing a court action under the Act to compel disclosure.[120] The object of the Commissioner structure is to minimize the number of cases that require court adjudication by interposing a neutral evaluation between the agency and court levels of case processing.[121] Under certain circumstances, the commissioner can apply for review of an agency decision to withhold information or can appear in a court proceeding on behalf of a complainant.[122] The Commissioner also reports to Parliament annually and may make special reports on access matters.[123]

4. Application to FOIA

A comprehensive study of the Connecticut and New York systems captures well the dilemma posed by the comparative method in this area:

> Application of the experiences of Connecticut and New York to the federal Freedom of Information Act requires caution. Freedom of information provisions and practices vary from state to state and often differ significantly from the provisions and practices of the federal government. The size of the federal bureaucracy creates difficulties and problems that have not confronted New York and Connecticut. The federal government is also more likely to acquire or create politically sensitive records. The states possess little information related to national security, and state criminal law enforcement agencies are likely to be significantly smaller than their federal counterparts. Also, the regulatory emphasis of federal agencies is more likely to generate documents or records that contain financial or commercial data of third parties. Furthermore, the political setting in which a freedom of information law operates reflects the geography, economy, history, and population of each state.
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> * * *
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> Yet, while the differences between state and federal agencies suggest caution, the similarities offer insights into the federal Freedom of Information Act.[124]

The Canadian experience, though based upon agency activities on the scale and of the scope of the United States government, also is grounded in a different political structure and experience. Moreover, while the two state agencies have operated for roughly ten years, the Canadian Information Commissioner is only in her third year.[125] Whatever the differences, however, the important consideration for the purposes of this study is that functioning administrative entities for access dispute resolution exist, and that structured within their unique political contexts, appear to serve an important role.

II. INTERVIEWS: PERCEPTIONS AND VALUES

A. Introduction

The individuals interviewed for the study fell into essentially five categories. The first category consisted of federal agency officials, primarily lawyers, who have had substantial litigation or counseling experience (within or without the Department of Justice) in the FOIA area. The second category consisted of representatives of organizations, primarily public interest groups, that make frequent use of FOIA. The third category consisted of private attorneys who either by virtue of their past experience or present practice have substantial familiarity with FOIA matters. The fourth category consisted of staff of congressional committees that have FOIA jurisdiction. The fifth category consisted of federal judges, at the trial and appellate levels, whose caseloads have a significant FOIA component. A total of 27 in-person interviews were conducted and well over 100 interested persons were given an opportunity to react to the study in two distinct forums.[126]

The interviews were not intended as a poll of individuals or groups on the questions of the study. They were conducted informally for the purpose of obtaining frank, informed views on the operation of the current structure for access dispute resolution and the prospect for improving it through the use of an administrative mechanism. While the persons interviewed were selected on the basis of their professional association or activity, they did not purport to speak other than as individuals. Likewise, although each person interviewed fell within one of the groups indicated above, the views expressed were not necessarily consistent within those groups. The narrative summary below undertakes to identify areas of consensus and difference, generally without regard to these groupings.

The interviews focused primarily on the three issues of delay, cost and quality of decisionmaking. These issues are to some extent interrelated and could also be framed in somewhat different terms. Nevertheless, they provide a convenient and relatively comprehensive organizing principle for this section. A fourth issue headed "access philosophy" is included to take account of views that bear importantly on the overall inquiry, but do not fit appropriately within any of the other categories. Finally, some important ideas expressed in the course of the interviews related directly to particular proposals for an access dispute resolution mechanism and are reflected in later discussion of those proposals.

B. Delay

The importance of timely decisionmaking in information access disputes is a matter about which there is little disagreement. For the purposes of this study the important question is where and to what extent delay now occurs. Delay at the agency level has been a widely-discussed problem.[127] It is generally attributed to the number of requests received, the volume of records requested, the complexity of the issues involved in the requests, the extent of resources devoted to processing requests and sometimes to agency intransigence.[128] Delay at the litigation stage has received less attention. It is generally attributed to the factors that affect all federal court litigation--caseload and limited judicial resources.

Delay at the agency level can affect any case and therefore is a more prominent concern than post-agency delay, which affects only the relatively small number of cases litigated. There was a clear consensus among the persons interviewed that while agency delay remained a fundamental problem in the administration of FOIA, it generally was not a problem amenable to treatment through the use of a separate administrative structure.[129] Here, the most commonly made point was that the speed of case processing at the agency level is affected primarily by the factors noted above and that any large-scale formal intervention by an outside body, prior to final agency disposition, would be subject to the same delay-producing factors. It was, however, frequently suggested that some cases might, at the agency level, benefit from the availability of an agency or individual serving in an "ombudsman" capacity. It was also suggested in a few instances that the existence of a prominent, credible administrative entity serving in an "inspector general" capacity could promote more timely case processing by the agencies. Moreover, it was suggested that for some issues the exercise of rulemaking power by a centralized policy agency could reduce delay. Finally, it was suggested that the speed of case processing was often a function of the substance of the exemptions, leading to a conclusion that a substantive, rather than a procedural, solution would more directly address the problem of delay prior to final agency denial.

Delay after final agency denial is, as noted above, largely a function of the same factors affecting all federal court litigation. As originally enacted, FOIA provided that:

> Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this

> subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.[130]

This provision was repealed by the Federal Courts Improvement Act of 1984,[131] as part of a consolidation of the large number of expediting provisions that had been enacted over the years. The new legislation generally permits expediting in the discretion of the court "if good cause is shown."[132] The legislative history contains a reference suggesting that FOIA cases should not be adversely by affected by this change.[133] It appears too early to assess the actual impact, and there has always been some feeling that the original expedition provision had little practical effect. The fact remains, however, that the formal rule has changed.

There was a consensus among the persons interviewed that FOIA litigation took longer than was desirable. But there was little agreement as to the cause for delay apart from the general factors affecting all federal court litigation.[134] Many suggested that the use of generalist judges, rather than access specialists was responsible for part of the delay. Others suggested that delay was sometimes simply a function of the volume of records at issue or other unique factors affecting the particular case. Some suggested that procedural formality and government procedural tactics were occasionally factors. Still others suggested it was due in part to tactical maneuvering by certain classes of requesters or by the actions of interested third parties. Nevertheless, most persons interviewed who expressed concern about delay in litigated cases tended to speak in terms of the entire decisional process, including delay at the agency level. It even appeared that from some perspectives the sharp break represented by having a case move from the agency to an independent decisionmaker diminished the sensitivity to the delay in the judicial proceeding.[135]

C. Cost

Attempts to identify costs in FOIA administration have generally proved difficult. Cost estimates vary widely and disparate methods of accounting have generated considerable controversy.[136] Commonly reported estimates for annual costs of administration vary from $50 to $250 million.[137] These estimates, however, are intended primarily to reflect the costs of agency processing. There are no published reports of efforts to isolate costs to the government or requesters attributable to enforcement after final agency denial. While reliable estimates along these lines would be helpful in evaluating the central issue in this study, the necessary raw data for calculating these costs is not available. Yet the nature of these costs, as much as their precise amount, is important to an understanding of the economics of the present enforcement structure.

Most persons interviewed who were familiar with the FOIA litigation process, characterized it as relatively low-cost litigation.[138] From the standpoint of sophisticated (either experienced or well-financed) requesters, the initial costs consist of the preparation of a rather straightforward "form" complaint and the payment of a modest filing fee. The action can be undertaken with a high degree of confidence that the matter will likely be settled or decided in a summary proceeding and that the plaintiff will not likely be subjected to discovery by the government. Likewise, the need for discovery against the government will ordinarily be minimal. And, as in the case of requester perspectives on delay noted above, the costs tend particularly to be viewed by sophisticated requesters as modest for a shift from an interested forum to a disinterested one.

Beyond the minimal initial expenditure, the costs are largely a function of representational costs associated with negotiation or further formal proceedings. Typically, the plaintiff will seek a Vaughn index, again through the filing of a "form" motion. Most importantly, whether or not the Vaughn motion is filed or granted, there was general agreement that even the filing of the suit increases significantly the likelihood that the plaintiff will ultimately obtain access beyond that granted in the final agency disposition. Thus, again for sophisticated requesters, absolute cost is only a part of what amounts to an informal cost-benefit analysis.[139]

For the less experienced or less well-financed requester, the cost considerations are somewhat different.[140] First, there was substantial agreement that some requesters are deterred from pursuing their claims beyond the agency level by the perceived or real cost of federal court litigation. Second, it was suggested that the cost may be relatively greater for less sophisticated requesters who tend to rely upon counsel less familiar with the uniqueness of FOIA litigation in federal court. Third, the uncertainties associated with the award of attorneys fees in FOIA litigation was seen to diminish generally the value of that device for requesters who could not bear more than minimal costs. Finally, for the requester who for reasons of cost chooses to proceed pro se, it was generally agreed that federal district court was not a desirable forum.

From the government's perspective, cost is closely related to the factors that affect cost to the sophisticated requester. It was generally agreed that the regularized nature of the FOIA practice lends itself well to the government's structure for litigation. Much of the practice relies upon "form" pleadings.

The preparation of a Vaughn index was, however, recognized as a relatively costly undertaking because of the detailed, case-specific nature of the document.[141]

While the Department of Justice maintains and reports detailed statistics concerning its costs in administering the Act with respect to requests made for Department records, it does not undertake to estimate the costs of its representation of itself and other agencies in defense of FOIA suits.[142] Moreover, at the point of litigation not only is the Department of Justice devoting resources to the matter, but also the agency whose records are at issue is usually substantially involved in the defense, including the preparation of affidavits or Vaughn indices. These costs are generally not accounted for in agency reports. It was suggested, however, that the concentration of litigation in the District of Columbia makes this working relationship more efficient, and presumably less of a cost consideration than it might otherwise be.

Finally, it would seem plausible that useful litigation cost data could be obtained from cases in which attorneys fees were awarded. Yet for at least two reasons this is not practical. First, in a high proportion of those cases in which fees are awarded the fee issue is settled rather than litigated and there is no official report of the underlying data. Second, in the few reported decisions in which the fees issue was litigated, the disparity in the factors that would bear upon the award render the numbers essentially anecdotal.[143] This provides no sounder basis to generalize from than the statement made in various forms by a number of persons interviewed that litigation of a FOIA case can easily cost "several thousand" dollars. If, however, one accepts all cases in which attorney's fees are awarded as representative of FOIA litigation generally, then the fee awards reported by the Department of Justice provide some basis for evaluating typical litigation costs for a plaintiff.[144] For the five-year period, 1980-1984, the Department reported a total of 221 distinct cases in which attorney's fees were awarded.[145] The median award was $2443. The range of the middle 50% of the awards was from $585 to $8017. At the extremes were awards under $100 and awards approaching--and one exceeding--$100,000. Assuming an equivalent median cost to the government (discounting for the economy of scale but recognizing the offsetting premium of a Vaughn index) the combined median would be $4886. Multiplied by the roughly 500 cases filed annually, the median statistic would yield a total litigation cost of nearly $2,500,000. To this could be added roughly another $1,100,000 for cost to the judiciary of FOIA cases based on a formula used by the Administrative Office of the Courts.[146] The approximate total cost would thus be $3,600,000 or roughly $7200 per case. While this data is clearly imperfect, it does tend to confirm the impressions of cost conveyed in the interviews.

D. Quality of Decisionmaking

Any assessment of the quality of decisionmaking under the current enforcement structure is, of course, highly subjective. Yet, as it developed, the product of the interviews in this area was more revealing and reflected greater consensus than on any other issue.

Significantly, there was virtual unanimity in the view that judicial enforcement has been critical in the development of federal access policy.[147] The courts are seen as having molded, in the face of agency resistance, a vague and far-reaching statute into a generally manageable set of substantive and procedural rules for access. While the 1974 amendments to FOIA reflected congressional dissatisfaction with some early policy development in the courts,[148] far more of the overall development was embraced in the legislative process than was criticized.[149] Equally important, the courts are unquestionably perceived as a force of independence in the disposition of FOIA cases.[150]

This broad agreement as to the significance of the courts' role in the development of FOIA policy is tempered somewhat by a number of subsidiary considerations that taken together bear importantly on the question of the present quality of decisionmaking in this area. First, the expertise that has developed in the courts over the years is concentrated in the District of Columbia.[151] It was frequently suggested that adjudications in cases outside the District, particularly in districts that hear relatively few FOIA cases, are somewhat erratic substantively and tend to proceed more slowly. Secondly, it was observed that the document review function of the courts in FOIA case processing has been less important than the policy-making function. In turn, as the body of caselaw has expanded and been refined, judicial resources are seen as being used less appropriately to the extent they are being devoted to document review. This process--essentially a factfinding function--was frequently viewed as one less suited to the capacities and resources of the federal courts than to those of a specialized adjudicator. Moreover, some viewed the _ex parte_ nature of the proceeding in cases in which heavy reliance is placed on _in camera_ review and advocacy as presenting a particularly awkward role for the courts. Finally, a more subtle, but extremely important observation was common throughout the range of perspectives represented in the interviews. Given the mature state of the caselaw development and the administrative burden imposed by the undifferentiated mass of FOIA cases that reach the courts, judges are perceived by many close to the process as having "lost interest" in the area. Clearly, the basis for this perception is difficult to document and it was rarely expressed in terms of a failure of the courts to perform properly. Rather, it was generally a forward-looking concern that the courts might not reasonably be expected to perform indefinitely the major FOIA enforcement responsibility.[152]

E. Access Philosophy

It is common to view participants in the FOIA process as either pro or anti-disclosure in their outlook. Yet virtually all observers in the field make plain their commitment to the principle of openness in government subject only to legitimate needs for secrecy. Why then the general perception of two warring camps? One answer, which is beyond the scope of this study, lies in differences as to the appropriate substantive refinement of the general principle.[153] The other, which is critical to this study and not entirely distinct from the first lies in disagreement as to who can and should be "trusted" to perform the fact-finding and law-applying function in access cases. The interviews were particularly helpful in assessing how the answer to this question bears on the overall inquiry.

There is general agreement that any public access law requires a mechanism external to the agency's decisionmaking process to review agency compliance with the law in particular cases. From the outset, FOIA has provided that such review was to occur de novo in a federal district court.[154] This choice reflected a desire both to assign the review function to a "disinterested" branch of government and to limit deference to the most "interested" decisionmaker. This form of review has come to be seen in some quarters as indispensible to fair administration of the Act.

A derivative view of the indispensibility of judicial decisionmaking sees the entire executive branch (as well as independent agencies) as collectively "interested." Taken to its extreme, this view holds that no decisionmaker who is connected even loosely to the executive branch can reliably perform the review function. This view is also extremely sensitive to actual or perceived conflict in functions within the executive branch. The most common example cited in this regard is the dual guidance-providing and litigation defense function of the Department of Justice. Most significantly, this view is sensitive to the perceived access philosophy of the administration in power at any particular point.[155]

Apart from the concern with decisionmaker bias, it is apparent that the courts, even when perceived as less than vigorous in the enforcement of FOIA, hold attraction as a known quantity. The uncertainty that would be associated with any reassignment of the decisional role limits its appeal. This is particularly true in the context of the ongoing debate over substantive reform of the Act. While some observers view the question of such a change as a politically-neutral procedural issue, others see it as part of an effort to "dismantle" FOIA.[156]

For the purposes of this study, the consequence of these factors is twofold. First, it seems clear that some evaluation of the efficacy of the present structure for decisionmaking is tempered by concern for not putting at risk the known judicial mechanism. Secondly, and far more importantly, any consideration of change in this area must proceed from a recognition of how integrally the availability of the de novo court action is connected to perceptions of fairness in administration of the Act.

One final issue of access philosophy also leads to a particularly notable divergence of views on the question of how well the current dispute resolution structure is working. The issue, simply put, is whether "core" users of the Act (journalists, academics, public interests groups, among others) deserve preferred treatment over "non-core" users (commercial interests, litigators, prisoners, among others). For the most part, any such differences would be inconsistent with the "any person" standard of the Act.[157] For some purposes, however, core requesters tend to be favored--for example, with respect to fee waivers and attorney's fees.[158] Current proposals for FOIA reform would extend the dichotomy even further.[159]

In the context of this study, the question of the desirability of a new mechanism for access dispute resolution poses a further choice along those lines. Should the mechanism exist only for core cases, only for non-core cases, or for both? The opinion expressed in the interviews along these lines fell basically into two categories. One view was that any new mechanism would function more effectively if it had the capacity to process cases on different tracks depending on factors generally associated with the dichotomy between core and non-core cases. This view was tempered in some instances by an expression of concern over further departures from the "any person" principle. The other view, based on more parochial interests, reflected concern that the principles for categorizing cases would unjustly advantage or disadvantage certain requesters. Here, as elsewhere, the matter of individual access philosophy tends to control.[160]

F. The Significance of the Interviews

Ultimately, the significance of the interviews lies not as much in the insight they provide into the day-to-day functioning of the current access dispute resolution structure, as in their reflection of the range of perceptions and values that surround FOIA. Were no shared interests or concerns revealed, it would be difficult to proceed to the question of alternatives mechanisms. The interviews suggest, however, enough common ground to guide a more focused inquiry.

III. ANALYSIS AND RECOMMENDATION

A. The Problem and the Objectives of a Solution

From the outset, a basic aim of this study has been to determine whether exclusive reliance upon the *de novo* judicial proceeding is responsible for delay, cost, or qualitative deficiencies in the resolution of access disputes that could be minimized through the use of an alternative mechanism. It is important to understand, however, that to identify burdens associated with the judicial process is not to suggest that all classes of users are affected equally by those burdens or would benefit equally from an alternative system. Nor is it to suggest that it will be possible to project with a high degree of confidence the extent to which a particular mechanism could reduce the overall burden. At this stage it is sufficient to recognize that both the quantitative and interview data indicate that the current dispute resolution structure imposes significant, though varying, burdens.

To follow substantial agency processing delay with months and sometimes years of costly and delay-ladened federal court litigation hardly seems the most desirable method for disposing of a media request for timely information on an issue of vital interest to the public. Nor does it seem the best use of the federal courts to impose with no limitation the duty to resolve the hundreds of less pressing claims for access to federal records. Similarly, from the viewpoint of the unsophisticated requester the spectre of federal court litigation to resolve a relatively modest request for access seems unduly imposing. And for the requester whose interest is in using the Act for harrassment or to satisfy commercial interests, the judicial forum is either perversely attractive or simply worth the cost. The question remains, however, whether the use of an administrative agency can meaningfully relieve these burdens in a manner consistent with the concerns and values that have developed around the FOI concept in the United States.

A useful first step in addressing this question is to attempt to develop a taxonomy of the FOIA case remaining in dispute after final agency action. Ideally, one might develop several different taxonomies to reflect the substantial variation in access disputes represented by distinct classes of requesters with differing objectives and with interest in diverse categories of records. For the purposes of this study, however, it is more helpful to identify the common features of access disputes generally, taking note of relevant differences where they exist. The common structure for such a taxonomy, reflected in the growing body of dispute resolution literature, would include consideration of: (1) the nature of the dispute, (2) the relationship between the parties, (3) the amount in dispute, (4) the need for speed in resolution, and (5) the cost of the process.[161]

1. The Nature of the Dispute and Relationship of the Parties

The typical FOIA case remaining in dispute after final agency processing is a sharply focused controversy. There remains an unsatisfied request for identifiable records and the only issue in dispute is whether one or more of the statutory exemptions is applicable. If so, the requester has no right of access; if not, the records must be released. The dispute centers on a seemingly uncompromisable position. Either the records are available publicly or the statute recognizes a governmental or third-party interest that would justify withholding.[162] It is not ordinarily the unmanageable "polycentric" dispute with a wide range of possible resolutions, each having "proliferating ramifications."[163] Rather, it is relatively well-suited to a process that identifies interests and declare rights based on proof and argument measured against precedentially-refined statutory standards.[164]

FOIA cases remaining in dispute after final agency denial are also highly distilled. They have been subject to two levels of agency decisionmaking by access specialists normally well-versed in the large and complex body of caselaw that has developed over the years and familiar with the agency programs that generate the records. While on novel or particularly sensitive issues agency decisionmaking is likely to reflect narrowly parochial views, the more routine cases will generally reflect good faith observance of established precedent, if for no reason other than to ensure a defensible litigation position. Thus, the cases which may become subject to further dispute processing will generally fall into one of two categories. Either they will involve the relatively routine application of prevailing caselaw to the particular requests or they will raise novel or unusually delicate issues the resolution of which is less predictable on the basis of precedent. It would appear that the former category represents a large group of litigated FOIA cases and that the government prevails in ligitation at an extremely high rate in this group.[165]

There are a number of possible reasons that FOIA cases that appear to have a highly predictable legal outcome would be litigated at a relatively high rate. First, the request may arise out of another distinct dispute with or interest in the agency or a third party, and the intensity with which the FOIA dispute is pursued may reflect more the intensity of the underlying interest than the merits of the FOIA claim. Second, the inherent imbalance in knowledge between the agency and the requester of the facts relevant to the resolution of the dispute generates distrust that often can be overcome only by placing the matter in the hands of a neutral decisionmaker. Third, because the litigation process undertakes to ameliorate--through the use of Vaughn indices--the unavailability of true adversarial testing of an agency's position, it may often represent the first point at which the requester has a detailed statement of the agency's position, as well as an opportunity to gain more information about the requested records. Finally, counsel or pro se plaintiffs who lack experience in this relatively specialized field may simply miscalculate their chances of success.[166]

Nevertheless, the typical FOIA dispute is a discrete controversy. While it may be related to another matter involving the parties, it is ordinarily a single transaction and is not a function of an ongoing relationship between the parties.[167] Thus, for the most part, there is no relational interest to protect, or at least none that would be harmed seriously by the institution of litigation. Moreover, because the denial of access represents a sheer assertion of governmental authority and because there may be no alternative source for the information sought, the typical requester stands in a relatively weak position to effect any change in the agency posture short of litigation.[168]

2. The Amount in Dispute

With rare exception, the FOIA dispute is a non-monetary controversy. The potential loss to the government or a third party or the potential gain to the requester from a particular disclosure generally has no calculable value.[169] Thus, while each side frequently views its interest as vital, the convenience of a dollar amount for categorizing the magnitude of a controversy is simply unavailable for access disputes. Nevertheless some approximation of "stake" may be modeled. Requesters who have merely a personal curiosity about the records in dispute might be viewed as standing at one end of a non-monetary scale of stake. Media and public interest requesters would then be placed at the other end of the scale. The stake of the historical researcher would in many cases be seen to lie closer to a midpoint, while the stake of commercial interests or parties in litigation with the government would often approach the media position. Other cases, too diverse to classify, would lie at still other points on the scale. With the exception of cases in which the government is only a "stakeholder" for other parties, the fact of denial of access on appeal ordinarily would indicate that the agency perceives that it has a significant stake in the outcome. Thus, in most

FOIA disputes, the agency stake would lie at the high end of the scale. Stake in FOIA disputes, however, remains something far more closely related to party perceptions and intended use than the intrinsic value of the information.[170]

3. The Need for Speed

Evaluating the need for speed in resolving FOIA disputes poses problems similar to those involved in evaluating amount at stake. Speed is not an absolute consideration. The difference between two weeks and two months will be critical in some cases, while the difference between two months and two years will make little practical difference in others. It would be possible to develop a scale similar to the stake scale to represent the need for speed in resolving FOIA disputes. Media requests would, of course, generally be viewed as having the greatest need for speed. Nevertheless, because all information is considered "perishable" to some extent, the breadth of the scale would likely be narrower than the stake scale. Moreover, because there is no practicable way to compensate a requester for delay in obtaining disclosure, prompt resolution of the dispute is even more important. Finally, because the agency position, i.e., nondisclosure, prevails unless and until it is reversed, the burden of delay falls exclusively on the requester.[171]

4. The Cost

The cost of resolving FOIA disputes also affects various classes of requesters differently. Some requesters are simply well-financed or well-staffed for FOIA litigation; for them the relatively moderate costs of a FOIA proceeding are insignificant. For other less well-supported but experienced requesters, the anticipated recovery of statutory attorney's fees in meritorious cases likewise may make cost a less significant consideration. Yet for still other requesters litigation costs may represent a significant deterrent to pursuing a claim beyond final agency denial. Nevertheless, given the overall policy of the Act and the difficulty of attributing any specific monetary value to a FOIA dispute, it appears fundamental regardless of who the requester is that the dispute be resolved in the most cost-effective manner possible.[172] Moreover, given that the government incurs significant costs in all FOIA litigation, a cost-effective process for resolving access disputes provides general public benefit as well.

5. Procedural Models

The taxonomy of a FOIA dispute may next be evaluated against the processes available for dispute resolution. While the range possible processes is virtually limitless, certain core models provide the most convenient framework for analysis. The charts below, adapted from a leading text on dispute resolution, identify the primary characteristics of five procedural models that might be considered suitable for access dispute resolution.[173] Two of the five--adjudication and arbitration--are normally considered binding procedures. The other three--mediation, fact-finding and ombudsman intervention are normally considered non-binding. Any of the five models, or a combination of certain of them, could be implemented through the use of an administrative entity; only the first--adjudication--would be consistent with the traditional role of a federal court, although certain others could be considered appropriate adjuncts to the judicial process.[174] Excluded from the chart are models that would be inconsistent with the governmental character of an access dispute, such as private judging. Also excluded are models that do not involve the use of a third-party neutral, such as negotiation.

BINDING PROCESS

Characteristics	Adjudication	Arbitration
Voluntary/ Involuntary	Involuntary	Voluntary
Binding/ Nonbinding	Binding, subject to appeal	Binding, subject to review on limited grounds
Third Party	Imposed, third-party neutral decisionmaker, generally with no specialized expertise in dispute subject	Party-selected third party decisionmaker, usually with specialized subject expertise
Degree of Formality	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments

Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion

NON-BINDING PROCESS

Characteristics	Mediation	Fact-Finding	Ombudsman
Voluntary/ Involuntary	Voluntary	Voluntary or involuntary	Voluntary
Binding/ Nonbinding	If agreement, enforceable as contract	Nonbinding but results may be admissible	Nonbinding
Third Party	Party-selected outside facilitator, usually with specialized subject expertise	Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court	Third-party selected by institution
Degree of Formality	Usually informal, unstructured	Informal	Informal
Nature of Proceeding	Unbounded presentation of evidence, arguments and interests	Investigatory	Investigatory
Outcome	Mutually acceptable agreement sought	Report or testimony	Report

Apart from the fundamental need to use a third-party neutral in resolving access disputes, the most basic issue in structuring a dispute resolution system for access cases is the choice between the use of a binding or a non-binding procedure. It is, of course, essential that at some point a mechanism exist to render final, principled, and reasoned determinations of rights and duties in access cases and that these determinations be available as precedent to guide future decisionmaking.

The question remains, however, whether resort to that mechanism should immediately follow final agency denial or whether submission of the dispute to a less formal, non-binding process should be a prerequisite to use of the binding procedure. While the answer is not free from doubt, the dominant considerations militate in favor of the immediate availability of a binding procedure.[175]

As suggested earlier, the FOIA dispute is ordinarily a highly contentious, single transaction that inherently produces binary results. Agency decisions on appeal are the distilled product of tens of thousand requests, and at the point they issue, represent the end of a process that easily has consumed a month or two of time and considerable governmental resources. The slim prospect that a dispute in this posture will yield meaningful compromise through purely facilitative techniques makes the imposition of a mandatory layer of non-binding process too costly both as a matter of time and resources. This conclusion dictates the rejection of either mediation, fact-finding, or ombudsman intervention as a prerequisite to more formal FOIA dispute processing and focuses attention on the choice of a binding procedure. It leaves these processes available, however, for non-mandatory use.[176]

The differences between the remaining procedures--adjudication and arbitration--are relatively subtle and largely a function of the arenas in which they have been used.[177] Adjudication is normally considered involuntary and arbitration, voluntary. Yet arbitration can be made involuntary. Both are binding, with somewhat problematic differences between the extent to which they are reviewable.[178] They differ primarily in the degree to which the third-party neutral possesses specialized expertise and the formality of the procedure. Importantly, these differences are two of the traditionally-perceived differences between judicial and administrative decisionmaking. To put the matter differently, the choice in the case of a binding process for FOIA dispute resolution is essentially a choice between judicial and administrative adjudication.[179]

The issue thus turns to the difference between a judicial or an administrative forum for binding FOIA dispute resolution. Most of the contemporary dispute resolution literature poses the procedural choice as one between court adjudication and non-adjudicative alternatives and is consequently not particularly helpful at this stage of the analysis.[180] One theme emerges, however, that transcends all issues of procedural choice. There is a prominent view that the federal courts are overburdened with controversies that do not merit the attention of an Article III body and that would be handled more appropriately by specialized, non-Article III tribunals.[181] On the other hand, courts generally, and the federal courts particularly, are viewed as uniquely capable of providing independent, objective decisionmaking.[182] Any process choice made must take account of these perceptions and make the most effective use of the limited resource Article III courts represent.

Virtually every other consideration militates in favor of using an administrative agency rather than a court for the primary resolution of FOIA disputes. First, an administrative structure permits the development and use of specialized, expert decisionmaking. In the FOIA area, this expertise would relate not only to the large and complex body of access law, but also to agency programs and operations that generate the records at issue. Second, centralization of the adjudicative function should promote greater consistency in decisionmaking. Third, two key features of federal court practice--notice pleading with procedures aimed at narrowing ill-defined issues over time and broad discovery--are simply inapt for FOIA cases. Fourth, the flexibility of administrative procedure would permit the development of rules and practices tailored to the particular needs of access disputes. Fifth, a specialized administrative forum would free access cases from the crowded federal court dockets and at the same time provide a structure in which docket management could be used meaningfully to provide expedited treatment for cases warranting it. Finally, the use of traditional judicial review of administrative action would provide a means of preserving a law-interpreting role for the federal courts in FOIA disputes--as well as a check on arbitrary decisionmaking--while preserving the fact-finding and law-applying function for the specialized body.[183]

This view of the choice between reliance upon the courts and reliance upon an administrative entity for binding FOIA dispute resolution draws heavily on the traditionally-perceived benefits of administrative agencies. It consciously omits, however, one aspect of the traditional view--that the agency serve as the primary policymaking body within its field. Policymaking in the FOIA area over the nearly two decades of the Act's existence has reflected a unique blend of legislative, executive and judicial sharing of responsibility.[184] In light of that history it would be somewhat unrealistic to expect that a credible adjudicative agency could at the outset assume a significant part of that overall responsibility. Reform of the structure for general access policymaking is a question that deserves additional attention, but the central question of this study--the desirability and feasibility of a mechanism for access dispute resolution--has independent importance.[185]

In the final analysis this question may be one that can be answered only by a process of experimentation. Yet it seems clear from the evidence gathered in this study and the foregoing analysis of FOIA disputes that any such undertaking would require the observance of certain principles:

1. The agency should be established in a manner that ensures the highest reasonable degree of independence.

2. The process of the agency should preserve the valuable features of the current judicial proceeding while taking advantage of the opportunity to tailor procedural rules to the needs of access dispute processing.

3. The agency should be structured primarily as a case processing entity rather than a policymaking body.

4. The agency's docket should be restricted in some fashion that insures that its workload does not preclude prompt decisionmaking.

5. The agency should have discretion to process cases of different classes on different procedural tracks.

6. The staffing of the agency should ensure the development of substantial decisional expertise.

7. The agency should be accessible to all requesters regardless of geographical location or resources.

8. The agency should be designed to provide an opportunity for informal resolution of access disputes.

9. The relationship between the agency and the courts should be structured to make the most appropriate use of judicial resources while preserving the integrity of the agency decisionmaking process.

10. The agency should be structured with sensitivity to the need to avoid undue bureaucratization and administrative cost in access dispute resolution.

B. An Agency Model for Analysis

1. The General Framework

Most, if not all, of these objectives could be attained through the creation of an administrative authority either within a compatible existing agency or as a separate agency. The agency, hereafter referred to for convenience as the Information Access Authority, would be empowered to adjudicate access disputes under FOIA. It would also be authorized to provide conciliation services in access disputes. The head of the Authority would be appointed by the President with the advice and consent of the Senate for a term of years and be subject to removal only for cause. The primary adjudicative function of the authority would be performed by administrative law judges. Apart from administrative support for the Authority head and for the administrative law judges, the only other personnel essential to the Authority's functions would be a staff of conciliators.

The Authority would have two primary sources of jurisdiction for adjudications: (1) by consent of the parties and (2) by certification from a federal district court. The Authority's consent jurisdiction would arise after a final agency denial of access, upon the filing of a consent agreement by the parties. The Authority's certification jurisdiction would arise upon the granting by the district court of a motion for certification filed by a party to an access action within the time provided for answer, if final agency processing has been completed. The status of third-party submitters in the Authority's proceedings would be resolved by the same principles now being developed in the area of "reverse" FOIA policy. The Authority's consent jurisdiction would be plenary; its certification jurisdiction would be limited to cases evaluated against the specified standards for certification. Access actions in which no motion for certification is filed or in which the motion is denied would proceed in the district court. Upon the granting of the motion to certify, the underlying district court action would be dismissed. The Authority would then have exclusive jurisdiction to adjudicate the dispute, and its final order would be subject to limited review by a United States Court of Appeals.

2. Submission by Consent

Anytime after final agency processing, the agency and the requester could by agreement submit their remaining dispute for adjudication by the Authority. Submission of the matter to the Authority would preclude the filing of a court action during a fixed period of time. The time period would be subject to an opportunity for the agency and the requester to agree to a longer or shorter time in unusual circumstances. A final decision by the Authority in a consent adjudication would have the same binding effect as a decision in an adjudication following certification. If the Authority does not determine the matter within the required time period, the requester would be free to file the normal de novo action in federal court, or could await the Authority decision. Should the requester sue after the expiration of the time period, the court would not require the requester to exhaust the consented-to Authority proceeding.

The provision for submission by consent accomplishes several objectives. First, it reflects, for the particular controversy, the parties' recognition that the Authority is a desirable and appropriate forum for resolution of the dispute. This serves to legitimate the Authority's function and should assure each side of the other's willingness to respect the proceeding. Second, because the parties will be free to submit by agreement only so much of their controversy as remains in dispute, it provides an opportunity--short of the institution of suit--for the parties to attempt to narrow their disagreement. Put differently, the prospect of agreeing to submission provides an occasion to discuss compromise, with the outlet of non-judicial determination of those matters that cannot be settled. Finally, and perhaps most controversially, it places some "docket control" for the Authority in the agencies. By refusing to consent, an agency would force the requester who wished to pursue the matter, to file a federal court action. An agency would most likely take that position on one of two grounds--that the particular matter should be determined by a court or that the matter does not warrant further formal processing. While it may be desirable for the agencies to seek to eliminate further wasteful processing in frivolous cases by imposing upon requester the barrier of a federal court proceeding, the power to refuse to consent for that purpose would best be used sparingly if for no other reason that its exercise may lead the persistent requester to file the federal court action in any event. For those cases an agency believes should be determined by a court, the opportunity to refuse to consent provides a mechanism by which the agency can assert its position. The agency decision not to consent should not be directly reviewable. If after an agency refusal to consent the requester sues under the Act, the court will have the opportunity under the certification procedure, in effect, to overrule the agency's position.

While the parties should not generally be permitted to control the scheduling of cases on the Authority's docket, it seems appropriate in unusual circumstances, most commonly where a prompt determination is essential, that the parties be allowed to condition their submission on an expedited processing schedule. The parties' agreement could be made subject to acceptance by the Authority. Even in the case not requiring expedition, a fixed time limit after which the agency would lose jurisdiction would appear necessary to assure requesters willing to submit their disputes to the Authority that they would not languish on the docket. In the long run, of course, the general reputation of the Authority for timeliness in processing cases will be an important factor in determining its attractiveness to requesters for voluntary submission.

3. Submission by Certification

Within the period for filing an answer, any party to an access action would be free to file with the district court a motion to certify the matter to the Authority for adjudication, if final agency processing has been completed. The motion to certify should be granted unless the case presents (1) unusually complex legal questions, (2) unusually significant issues of access policy, or (3) is determined, in the discretion of the court, otherwise to be more appropriate for judicial resolution. The court should also be free to certify a matter, consistent with these standards, on its own motion. The court should also have authority to certify a case in part where to do so would promote efficiency in the resolution of the dispute. Upon certifying the matter, the court would dismiss the underlying action.

The provision for submission by certification, like the provision for certification by consent, accomplishes several objectives. First, and most importantly, it represents a determination that the Authority should not be merely an available alternative to to the traditional de novo federal court action, but rather the preferred and primary mechanism to resolve access disputes. While it might be suggested that the Authority should attain that status by proving its fairness and impartiality through cases taken by voluntary submission, there is significant risk that if it functioned only at the sufferance of requesters, its credibility with agencies and third parties might be jeopardized. Likewise, it would be difficult for the Authority to attain stature generally and provide a source of consistent decisionmaking, if it were merely a "competitor" of the district courts. Secondly, and virtually as important, the arrangement preserves the opportunity for the de novo court action in the special circumstances where that appears warranted. Concommittantly, in deciding the questions raised under its certification authority, the district court would have some opportunity to assess the quality of the Authority's management of its caseload. Ideally, over time, the number of cases in which certification is an issue would diminish, and even in the interim the certification proceeding itself should consume only a minimal amount of time and resources. Finally, the combination of the agency's power to refuse to submit a matter to the Authority voluntarily and the requester's continued right to bring a court action gives to both parties the opportunity to argue that the matter should remain in court, and where neither party objects, that would be the normal course. The court should remain free, however, to certify a matter on its own motion.

Limiting certification to cases in which final agency processing has been completed avoids exacerbating the problem of agency backlogs, while reserving for court resolution those cases in which the "due diligence" standard is not being met. As in the case of submission by consent, after certification the requester should be free to refile and proceed de novo if the Authority has not determined the matter within the fixed period of time. Also as in the case of consent, that right should not be subject to a "due diligence" claim. This approach reflects a balance of the Authority's primacy as the access decisionmaker against the need to ensure that its caseload is timely managed.

4. Venue

The Authority should be headquartered in Washington, D.C. In adjudications, whether by consent or certification, the administrative law judge should preside--where a formal proceeding is necessary--in the geographical location most convenient for the particular case. The presumptively appropriate location should be the District of Columbia. Upon a showing by either the requester or the agency that the District would be inconvenient, the administrative law judge should be assigned to preside at an appropriate alternative location. In conciliations, there would ordinarily be no need for the requester and the agency to be physically present, and these matters should be handled by correspondence and telephone to the greatest extent possible. Where in person sessions are necessary, a conciliator should be assigned for that purpose in the District of Columbia or at an alternative location.

Concentrating the physical presence of the Authority in the District of Columbia, but not making the District the exclusive forum, serves several purposes. First, it accepts the primacy of the District as the forum for FOIA dispute processing, and the soundness of the reasons underlying that *de facto* result. Second, it avoids the enormous cost and, in turn, the dilution of available resources that would result from establishing regional components throughout the country. Third, it nevertheless preserves the opportunity, in appropriate cases, to extend the presence of the Authority to distant forums. Finally, it helps ensure that the work of the Authority that can best be accomplished without in person proceedings will not be compromised by the perception that an Authority representative must be present to perform a meaningful function.

5. Adjudication

Adjudications should proceed *de novo* in a manner essentially similar to the current district court proceeding, but with an effort to use the flexibility of the administrative process to minimize cost and delay and improve the quality of decisionmaking. In adjudications by consent, documents in the nature of a complaint and answer should accompany the submission agreement. In adjudications by certification, the complaint and the answer (if filed) would be transmitted to the Authority by the district court as part of the certification order. In either case, once the matter is lodged with the Authority, it would be assigned to an administrative law judge for hearing. Either party would then be free to make preliminary motions, including motions to compel the production of a Vaughn index and motions for summary judgment. Most importantly, however, by practice and by procedural rules the Authority should encourage the use of less formal techniques to determine the issues in controversy or promote settlement.

The prospect of using relatively comprehensive document review by the ALJ as a substitute for detailed Vaughn affidavits in appropriate cases illustrates one method of substituting substantive analysis for procedural formality. After the issue is joined, whether through pleadings or less formally, the case could be advanced through flexible procedures. Certain cases would simply not require disposition on the merits. For cases reaching the merits, where characterization of the records is not at issue, the matter would proceed by prompt summary disposition of the legal questions. Where the characterization of the records or portions thereof is in dispute, the necessary initial fact finding could proceed by the preparation and submission of an oral or written Vaughn index or by immediate submission of the records for in camera review. At the same time, the proceeding must retain sufficient formality to provide the parties a well-defined "shadow" in which to attempt to settle their dispute and to provide inducement to do so. Put differently, the proceeding should be structured to preserve the well-understood change in the complexion of a case as it moves from agency processing to a neutral forum.

The adjudication procedures should also be structured to provide for docket management consistent with the needs of access disputes. The most obvious illustration would be procedures for placing cases of different classes on different tracks for processing. Cases of particular urgency could be given expedited treatment. Cases involving large volumes of records but serving an important public function, as in the case of historical research, could be given priority over large volume cases involving a personal or commercial interest without full scale expedition. At this point, the range of possibilities need not be enumerated. The important consideration is that the use of these techniques would be available in the administrative process.

In cases requiring formal determination, the administrative law judge should decide, as in the district court proceeding, whether the records or any segregable portions thereof were improperly withheld and the burden to sustain the action should be on the denying agency. As suggested above, the administrative law judge should have authority to examine withheld records in camera. The administrative law judge should also have authority to order the disclosure of improperly withheld records and to award litigation costs and attorney's fees to a requester who substantially prevails.

The decision of the administrative law judge would become the final decision of the Authority unless reviewed on the record by the head of the Authority pursuant to a discretionary appeals procedure available to the requester or the agency. The discretionary review opportunity comports with traditional administrative practice and provides a mechanism for fostering sound and consistent decisionmaking within the Authority. To ensure that the determination can proceed with the required dispatch, the standard should be strictly limited to exceptional questions of law or fact.

After the period for seeking judicial review of an Authority decision has expired or after a judicial affirmance, a final decision requiring disclosure would, if not complied with, become enforceable through contempt proceedings in federal district court. This provides a meaningful enforcement mechanism in the unlikely event that an agency refuses to release the records.

6. Judicial Review

The final decision of the Authority granting or denying, in whole or in part, access to records should be reviewable in the United States Court of Appeals for the circuit in which the adjudication took place or in the United States Court of Appeals for the District of Columbia. The requester, the agency, or both should be entitled to obtain review of an Authority decision. A petition for review should be required to be filed within a short period after the final decision of the Authority. An Authority decision ordering disclosure would ordinarily be stayed pending review. Review proceedings should be expedited in accordance with the "good cause" standard of the Court Improvement Act of 1984. The decision of the Authority should be reviewed under essentially the same standard now used by Courts of Appeals to review District Court decisions in FOIA cases.

Providing for Court of Appeals review of Authority decisions not only preserves for an Article III body the determination of questions of law under FOIA, but also channels Authority decisions to the same forums that will review those cases that remain in the district courts, notwithstanding the availability of the Authority process. While the latter consideration alone might justify applying the same standard of review to both classes of cases, there is another important reason. The diversion of cases from the district courts to the Authority poses the uncertainty of a new system for requesters and agencies. Given the vagaries of the traditional formulations of the standards of judicial review of administrative agency decisions, it seems desirable to refer to a standard that is understood and accepted even if it is theoretically imperfect for describing judicial review of an administrative agency decision.

Review of final decisions of the Authority after certification should also include the question of the propriety of the certification by the district court. Any possible encumberance of the process by the availability of such review would appear justified by the need to ensure consistent application of the certification standard.

7. Conciliation

The Authority should make available, at any stage in the FOIA process, the services of a trained conciliator upon the agreement of the agency and the requester that the informal assistance of a neutral party would aid in the resolution of the dispute. The services of the conciliator in each matter should be tailored to the needs of the particular controversy. It could include, in appropriate cases, examination of the disputed records.

The term "conciliation" is used here to distinguish the process from the similar process of "mediation":

> Conciliation is a weak form of mediation. Unlike the mediator, the conciliator has no authority to propose his own solutions or suggest new ideas as a means of breaking an impasse in negotiations. In essence, the conciliator is a facilitator of negotiation between the parties. Like the mediator, the conciliator will pass on the parties' positions and priorities and will facilitate the search for common ground.[186]

Given the nature of the FOIA dispute--particularly its general non-amenability to formal compromise--the more subtle connotation of the conciliator function seems apt. This is best explained by illustration. In many cases, a requester seeks records on the assumption that they contain certain information when in fact the information of interest to the requester is simply not there. The records may well be exempt, but the requester's strong interest in the presumed contents drives him to actively contest the case. If a neutral third party was informed of the requester's interest and had access to the records, the matter could likely be resolved by a report to the requester from the neutral that the records did not contain the information the requester was seeking. The role of the conciliator might also go beyond document review to probing with an agency representative the basis for an exemption claim.[187]

Whatever the role of the conciliator, he must have the confidence of both the requester and the agency if the conciliation function is to be performed effectively. At a minimum this requires the agreement of both parties that the service would be useful in a particular case and, from the requester's perspective, that the service would be provided by an individual truly independent of the agency. The concilation staff should maintain a separateness from the adjudication staff and nothing said or done in the conciliation process should be admissible in a subsequent formal proceeding. Above all, the role of the conciliator should not be narrowly defined at the outset, but rather allowed to develop as the needs of particular cases are presented, bearing in mind that the purpose of the service would be not only to minimize the formality necessary to fulfill the basic policies of the Act, but also to protect the more formal dispute resolution process from an unmanageable caseload.[188]

8. Other Functions

In addition to the dispute-specific functions of adjudication and concilation the Authority ultimately could be assigned functions of a more general policy-oriented nature. These include most importantly the (1) formulation of government-wide policy through informal rulemaking, (2) the provision of informal advice and guidance to agencies and requesters and (3) the exercise of general investigatory authority with respect to government-wide FOIA compliance. Each of these functions offers promise for improving the overall administration of the Act and thus minimizing the number of disputes requiring post-agency processing. Yet each also represents a substantial undertaking and could impair initially the effective implementation of the adjudication and conciliation functions. On balance it would appear appropriate to consider assigning such additional functions to the Authority only after it has demonstrated its capacity to effectively discharge its primary dispute resolution duties.

9. Structure and Staff

The choice between establishing the Authority within a compatible existing agency and creating a separate agency involves both the question of independence and efficiency. The convenience and possible cost-savings that might be attained by using an existing agency structure must be weighed against the possibility of loss of independence and, in turn, against perceptions of loss of impartiality in decisionmaking.

As a matter of independence, appointment for a term of years with a cause limitation on removal seems a minimal requisite for the head of the Authority. Because the Authority would exercise significant law enforcement functions, it would appear necessary, for constitutional reasons,[189] that the appointment power be vested in the President. Unless the head of the Authority were to serve as an independent, but subordinate officer, in an agency headed by a politically-responsive presidential appointee, there would be no practical choice but to create a separate agency. Yet most agencies with politically-responsive heads would be considered inappropriate entities for housing the Authority, even if the Authority head had political independence.

One exception may be the National Archives and Records Administration (NARA), since 1984 an "independent establishment within the executive branch" headed by the Archivist of the United States appointed and subject to removal by the president.[190] The Authority, with a separately appointed head, could be established within NARA. The general archival and records management function of NARA[191] would seem at least substantively compatible with the access dispute resolution function of the Authority. There would remain, however, the administrative and political awkwardness of having an independent, but budgetarily and structurally subordinate, entity in NARA. This problem could be solved by having the Archivist, himself, serve as the head of the Authority, but the president's removal power with respect to the Archivist as presently granted is not as strictly circumscribed as with most independent appointees.[192] In any event, the consideration of independence in assessing the desirability of using an existing structure must be evaluated along with the possible administrative benefit of integrating the Authority.

This issue is best considered by attempting to gauge the staff size and structure that would be necessary to implement the Authority concept. Admittedly, this is a speculative undertaking. Regardless of methodology it cannot produce precise, highly reliable results. It can, however, offer a framework for analysis. Apart from this value, it also provides a basis for making a general assessment of the cost of establishing the Authority.

The obvious difficulty in estimating the resources that would be required to enable the Authority to perform its adjudicative function in a timely and effective manner is that no federal administrative entity has ever performed as the Authority would. Consequently, there is no directly comparable historical data. The courts, of course, now perform the post-agency dispute resolution function. Yet none of the readily-available data concerning the courts' performance of this function reflects active processing time, i.e., the time a judge and his support staff actually devote to handling access cases. Of the total time a FOIA case spends on the court docket--the median ranging from 7 to 10 months for the six-year period reported in this study--only a tiny fraction of the time actively involves the court.[193] The procedural progress of a case at its termination[194] and the nature of its disposition[195] reflect to some extent the nature and degree of the court's involvement, but the image is superficial at best and the active processing time remains obscure. The state access agency that performs the functions most closely analogous to those that would be performed by the Authority encounters many cases substantially different from those posed by access requests in the federal government. Its experience is of limited comparative significance.[196] Interestingly, the FOIA appeals offices in the agencies perform the most similar, though not perfectly analogous, function to that which the Authority would perform.[197] Unfortunately, little hard data concerning the active processing time involved in the performance of that function is available. Nevertheless by using a combination of certain court and agency data, it is possible to make a reasonable estimate of the active case processing time, and in turn the staff resources that would be required by an independent entity.

The simple starting point is to recognize that each case will not require the same amount of active processing time. Primarily three factors will account for the differences. The first is the degree to which the case relies upon the adjudicatory function. Cases that settle or are resolved in a summary proceeding will generally consume less time than more contentious cases. The second is the size and complexity of the case. Cases involving large numbers of records or unusually difficult legal issues will generally consume more time than simpler cases. The third is the expertise of the decisionmaker. An experienced, specialized decisionmaker will ordinarily be able to process cases more rapidly than a generalist.

There is some useful data available to approximate the effect of the first two of these factors; the third can reasonably be assumed.[198] Of all FOIA cases terminated in the six-year period covered by this study, 52.0% were "dismissed, discontinued, settled or withdrawn;" 40.3% were decided by summary judgment or other "judgment on motion before trial;" 1.5% were decided on "judgment after trial" and the remaining 6.2% were terminated in various other ways, all presumably less time-consuming than judgment after trial.[199] In three FOIA appeals offices in three distinctive agencies--Justice, Defense, and HHS--the active processing time for FOIA appeals, including document review, staff recommendation and drafting, averaged from 5 to 30 hours in cases requiring a decision on the merits.[200] Cases moved from the lower end of the range to the higher end of the range largely on the basis of the degree formality of the internal documentation and approval process, although case size and complexity made some difference.[201]

Assuming a rough correspondence between the nature of the appeals processing function and the function of the Authority, these data can be combined to produce a rough estimate of the active processing time for 500 FOIA cases in the Authority--the average number of FOIA cases now being handled annually by the federal courts.[202] The estimate also assumes that the 52% of cases dismissed, settled or withdrawn correspond to the low end of the processing time scale; that the 40.3% decided by summary judgment correspond more closely the middle of the scale; and that the 6.2% and 1.5% terminated in other ways or by trial correspond, respectively, to points at the high end of the scale. Using the calculations reflected in the chart below, this method produces the result of 3696 hours of active processing time for 500 cases:

ESTIMATED ACTIVE PROCESSING TIME FOR 500 CASES

Range of Processing Time (hours/case) 0 ----- 5 ----- 15 ----- 30 ----- 60

Percent of Cases	52.0%	40.3%	6.2%	1.5%	
Number of Cases	260	201	31	8	
	x 2.5	x 10	x 22.5	x 45	
Hours	650	2010	698	338	= 3696 TOTAL

Attributing all of the 3696 hours of processing time to the work of an administrative law judge and assuming a work-year of approximately 2000 hours, a 500 case workload would require 1.85, or in whole positions roughly two, ALJs. The relative accuracy of this estimate can be confirmed using a workload formula developed by the Administrative Office of the United States Courts.[203] From the results of a comprehensive study, the Administrative Office assigned a weighting to civil cases in over 100 case classifications on the basis of processing time demands. The weighting for FOIA cases was 1.5827.[204] Multiplying this weight times 500 case filings yields 791 "weighted filings." This number is then divided by 400, the number of weighted filings the Administrative Office estimates indicate the need for an additional district judgeship.[205] The resulting quotient is 1.98, or again in whole positions roughly two, judges.

The most significant unaccounted for variable in this estimate is the time related to travel that would be involved in hearing cases outside the District of Columbia.[206] Presently, only 60% of the total FOIA filings are made outside D.C.[207] Of these, less than half, on the basis of the above estimate, have even the potential to require the attendance of an ALJ at a live proceeding.[208] Assuming, notwithstanding the availability of document review by the ALJ and a process for written rather than oral submissions, that half of these cases require travel, the number is only 75, or 15% of the 500 case workload. The approximate active processing time of 4000 hours for the 500 cases includes a cushion of 304 hours, i.e., the calculated estimate is 3696 hours. This accounts for just over 7.5% of the 4000 hours. Adding this cushion to that which would be created by providing a clerk-assistant and a secretary for each ALJ position would create a combined effect that should accommodate travel time within the estimated requirement for 500 cases.[209]

Given the active processing time estimate, there still remains one major imponderable in evaluating the adjudicative staffing requirements for Authority. The two judge (with support staff) estimate is based upon 500 cases--the average annual FOIA district court filings over the past six years. It is entirely possible that the availability of the Authority as a dispute resolution forum would increase the caseload. A significant increase in the caseload would naturally require additional adjudicative staffing. As noted earlier, roughly 5000 FOIA cases annually have the potential for post-agency dispute processing.[210] These are cases processed through appeal within the agency in which the initial denial is affirmed in whole or in part. Theoretically, then, the caseload could increase tenfold, requiring twenty ALJs rather than two.

This extreme result seems highly unlikely for several reasons. First, it seems reasonable to assume that some portion of the requesters in these cases are satisfied by the appellate decision and drop out for that reason at that stage. Many simply accept the agency's appellate decision as correct and reasonable even though it denies them the full access they sought. Others, who receive greater access through the appeal than in the initial decision, accept that result as a form of compromise. Second, some requesters have availed themselves of the appellate process because it is a virtually no-cost opportunity for review, requiring only a simple appeal letter. Any additional cost or formality would be a deterrent to proceeding further. Third, the requirement for agency consent for direct submission of a case to the Authority for adjudication would mean that in those cases in which the agency withholds its consent the federal court proceeding needed to obtain certification would deter some requesters. Finally, and most importantly, a significant number of the remaining cases should be diverted from the Authority's adjudication docket by the availability of conciliation.[211]

Nevertheless, it simply is not possible to quantify these effects precisely. To provide a reasonable margin of safety one might assume that notwithstanding these effects the caseload would double. This increase from 500 to 1000 cases would require increasing the number of ALJs from two to four. Even if this assumption overstates the likely increase in caseload, given the uncertainties in the estimation of active processing time, the larger caseload assumption would compensate for an underestimation of processing time requirements. Ultimately, the most accurate estimate of the adjudicative staffing requirements should be put as two to four ALJs plus support staff.[212]

The two remaining staffing requirements for the Authority would be the conciliator positions and the administrative and support staff for the Authority head. Neither, however, is susceptible to approximation along the same lines as the ALJs.

The number of conciliator positions that would be needed is particularly difficult to gauge. The conciliation function is, of necessity, vaguely defined. Experience alone would determine more precisely the content of the function. Initially, the position might be staffed in a 1:2 ratio with the ALJ positions. Thereafter, staffing could be relatively easily adjusted to meet the demonstrated need.[213]

As long as the Authority head's functions are limited to agency management and discretionary review of ALJ decisions, a small administrative support group and a small personal staff should suffice for that office. If broader policymaking functions were assigned to the Authority head, a larger staff would be needed.[214]

The total staffing requirement for the Authority would thus be something on the following order:

Head	1
Personal Staff	2
Counsel	1
Administrative Group	2
ALJs	2-4
Clerk	2-4
Secretarial	2-4
Conciliators	1-2
Sec/Clerical	1-2
TOTAL	14-22

It would be entirely reasonable to conclude that an agency of this scale could most efficiently be established within a compatible existing agency, such as NARA. That benefit, however, is difficult to quantify and thus to weigh against possible real or perceived loss of independence. Given that limitation, creating the Authority as a separate establishment may best serve the overall objective of using an adjudicative entity.

C. The Ombudsman Model as an Alternative

The proposal for the establishment of an Information Access Authority contemplates an entity that would have both adjudicatory and conciliatory functions. This aspect of the proposal proceeds from the premises (1) that any formal administrative alternative to de novo judicial determination could be overwhelmed by its workload without the availability of some mechanism for informal dispute processing, and (2) that certain forms of informal processing could have independent value in access disputes.[215] A shift of the primary adjudicative function from the courts to an administrative agency, however, itself represents so fundamental a change in the access system that it is also useful to consider whether a purely non-adjudicative dispute resolution mechanism could minimize some of the burdens identified in this study.[216] Or to put the matter only slightly differently, would it be desirable and feasible to establish an entity having only a case-specific conciliation function while maintaining the adjudicatory function in the courts exclusively?

To evaluate conciliation as a primary rather than ancillary administrative responsibility requires a somewhat more detailed analysis of the function than has been presented thus far. Realistically, it may also require a change in nomenclature. While the rather vaguely defined term "conciliation"[217] is probably broad enough to encompass any case-specific, non-adjudicatory, informal dispute resolution mechanism that might be applied to access disputes, it is rarely used to describe a federal agency function, particularly one related to the resolution of claims by individuals against the government.[218] With no intention of assigning a controlling role to nomenclature, it would appear that the terms "ombudsman" or "ombudsman-like function" would better capture the nature of informal action that might be considered independent of adjudication of access disputes.

1. The Department of Justice Functions as Historical Antecedents

As noted earlier, the Department of Justice currently performs a number of functions in the access field that can bear upon the resolution of individual access disputes either before or after the initiation of a judicial proceeding.[219] When the performance of these functions serves to bring a particular dispute to a conclusion short of a formal judicial determination of the claim, the Department's role become particularly relevant to consideration of the ombudsman function. To understand the form and extent of the Department's current activity in this area it is necessary to review first its historical development.

The FOIA as originally enacted in 1966 made no provision for any special role for the Department in the implementation of the statute.[220] Formally, the Department was only another covered agency. As a practical matter, however, two well-established existing Justice functions formed the foundation for the development of a unique role for the Department. First, the Department served traditionally as legal adviser to other executive departments and agencies, particularly with respect to the implementation of generally-applicable legislation such as the Administrative Procedure Act (APA).[221] Inasmuch as the FOIA was formally an amendment to the APA, a legal advisory role for the Department evolved naturally. Second, the Department bore responsibility for representing most federal agencies in litigation.[222] In the exercise of this responsibility, the Department from the outset provided litigation defense in most suits against agencies under the FOIA.

These two functions were initially performed by separate components of the Department. The advice function was performed by the Office of Legal Counsel, the litigation defense function by the Civil Division. With growth in the use of the Act in the late 1960s and early 1970s, the number of court cases significantly increased.[223] A concern developed within the Department that the FOIA practices of many agencies failed to meet even its own relatively narrow views of what the Act required and that the defense of such cases in litigation not only would be inconsistent with the Department's express advisory positions, but also would produce precedent unfavorable to interests of the executive branch.[224] This concern evolved into a Departmental decision to more closely coordinate its advisory and litigation functions. In 1969, the Attorney General established the Freedom of Information Committee, composed of representatives from both the Civil Division and the Office of Legal Counsel, and requested that all agencies consult with the Committee before issuing a final denial of access "if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government." Through the Committee, the proposed denial would receive "timely and careful review in terms of litigation risks, governmentwide implications and the policy of the Act, as well as the agency's own interests."[225] The combination of pre-litigation review and counseling prior to a final denial represented an effort by the Department to influence agency decisionmaking in individual cases by implicitly suggesting that denials that failed to meet minimal, though unstated, standards might not be defended in litigation. Four years later the implicit threat was made explicit through the announcement of a Departmental policy not to defend agency decisions to withhold records unless the agency had consulted with the Committee prior to making a final denial.[226] The policy did not, however, elaborate the standards that would be used by the Committee in consultations or by the Department in determining whether to defend.

In the period 1969 through 1974, the Committee conducted several hundred consultations.[227] Many consultations dealt with issues that were by then becoming relatively settled and were often handled by telephone or through an exchange of correspondence. Others dealt with more complex or novel issues and frequently led to face-to-face meetings between agency officials and committee members. A report of the results of the 120 face-to-face consultations that had been held through 1972 reflected that roughly 40 cases led to a conclusion that the disputed records were "clearly or very probably exempt," that another 40 led to less certain conclusions as to the exempt status of the records, that 15 cases led to the conclusion that some records were exempt and some were not, and that in the remaining 25 the records were not exempt or that the case for withholding "was very weak."[228] While there is no readily available documentation of the extent to which the Committee's recommendations were followed by the agencies, it appears that in the "vast majority" of cases in which the Committee took a strong position that the subject records should be disclosed the agency aquiesced.[229] Only anecdotal evidence reflects the apparently rare case in which the Department declined to represent an agency because it disregarded the Committee's firm views or failed altogether to consult with the Committee.[230]

Between 1972 and the enactment of the Freedom of Information Act amendments of 1974, the Department's government-wide FOIA activity came under closer scrutiny. In the course of oversight hearings on FOIA in this period, the Department's de facto compliance-monitoring role was criticized.[231] The thrust of the comment, however, was directed primarily to the quality and effectiveness of the Department's overall FOIA activity, rather than the desirability of the Committee process. Nevertheless the resulting legislation did not institutionalize the Committee function. The 1974 amendments, as noted earlier, simply directed the Attorney General to report annually the details of FOIA litigation and "a description of the efforts undertaken by the Department to encourage agency compliance."[232] While this language gave the compliance function a form of de jure status, it left the Attorney General wide discretion as to nature and scope of its performance.

The only immediate change in the Department's compliance role following the 1974 amendments was a significant increase in the volume of work precipitated by a growing awareness and use of the Act by the public. From 1974 to 1977, the Department as well as all other agencies labored under the management of a vastly greater caseload.[233] The Committee's case-specific consultation function continued, but was diluted by sheer volume and by Departmental efforts to provide general guidance as to the implementation of the amendments. By 1976, the Attorney General announced that the combination of the amendment-imposed time limits for response and the developing case volume necessitated revocation of the requirement of agency consultation with the Committee prior to final denial.[234] While the case-specific litigation defense activity of the Department increased, the advisory function grew in its more generalized dimensions.[235]

With the change in administration in 1977, the Department's compliance-promoting activity took on for the first time an explicitly substantive character. The Attorney General announced that the Department would defend agencies in FOIA actions "only when disclosure is demonstrably harmful, even if there is some arguable legal basis for the withholding."[236] Although the initial charter of the Freedom of Information Committee had suggested that factors other than the bare legal basis for the denial would be considered in Committee consultations, "demonstrable harm" had never explicitly been made a condition to Department defense. Under the Department's new position, at least conceptually the Committee made a determination as to harm that would become the basis for the representational decision.[237]

At the same time this prospective standard was announced, the Attorney General ordered a review of the roughly 600 FOIA cases then pending in litigation to determine whether any should be settled.[238] On its face, this action represented a more potent exercise of authority by the Department than did the Committee consultation requirement. The Civil Division was in the position to alter immediately the defense posture in any case. The actual outcome of the review, however, is not precisely documented. It appears that a few cases were dismissed outright and that in a number of others disclosures beyond the agencies' prior positions were made.[239] Inasmuch as the Civil Division attorneys had in the past encouraged such changes at the litigation stage on an ad hoc basis, the comprehensive review directive arguably represented less a change in approach than a highly visible reminder to the agencies that the Department would in some cases exercise the threat of non-defense implicit in the Committee process.[240]

A little more than a year later, in 1978, the Attorney General established the Office of Information Law and Policy (OILP) as a discrete advisory component within the Department for FOIA matters.[241] The Freedom of Information Committee was incorporated into OILP and the Chairman was made the Director. In addition to maintaining the function of the Committee, OILP provided government-wide guidance and coordination on FOIA matters, as well as internal advice for the Department. As a practical matter, the establishment of OILP reflected an institutional maturation of the Department's statutorily-identified responsibility to promote compliance with the Act.[242]

Three years later, again with a change in administration, the Attorney General announced a revised substantive standard for implementing the Department's compliance-promoting function through the "refusal to defend" mechanism. The 1981 policy statement, generally understood to abandon the "demonstrable harm" standard, provided that the Department would defend all suits "unless it is determined that: (a) The agency's denial lacks a substantial legal basis; or (b) Defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records."[243] The following year OILP was abolished and its functions along with those of the Office of Privacy and Information Appeals (responsible for processing appeals from initial FOIA denials made by Departmental components) were transferred to a newly-created Office of Information and Privacy (OIP) in the Office of Legal Policy. Although OIP retained the agency counseling function, the Freedom of Information Committee was disbanded.[244] The FOIA litigation and advisory functions thus lost the structural connection that had existed since 1969. OIP nonetheless maintained an informal consultative relationship with the Civil Division.[245]

The compliance-promoting function of the Department today remains vested in OIP.[246] The Office, headed by two co-directors, has a staff of approximately 40, consisting of 18 attorneys, 13 paralegals, and roughly 7 secretaries and law clerks. Of the total Office resources, approximately 70% are devoted to the function transferred from the abolished Office of Information and Privacy Appeals.[247] This function consists of processing appeals from initial denials of access made by components of the Department under FOIA and the Privacy Act. Of the remaining 30%, the Office resources are devoted roughly equally between providing FOIA advice and guidance to other agencies and providing assistance to the Civil Division with respect to cases in litigation.[248]

The advice and guidance function is primarily carried out through government-wide distribution of guidelines and other published commentary and compilations, as well as through responses to both general and case-specific informal inquiries from other agencies.[249] Departmental regulations now provide that an agency that intends to deny any FOIA request "raising novel issues should consult with [OIP] to the extent practicable."[250] The litigation assistance function, performed at the request of the Civil Division in particular cases, consists of "reviewing the issues and proposed litigating positions and strategy ... from both legal and policy standpoints and developing positions promoting uniformity and agency compliance."[251] The Office's counseling function is thus exercised both through the rendering of case-specific advice to other agencies and to the Civil Division and through government-wide dissemination of general policy guidance.

Apart from advice wholly internal to the government, OIP and its predecessor entities have, at least since 1978, received and acted upon citizen complaints of agency failures to comply with FOIA.[252] The complaint is "discussed with an agency representative and, where appropriate, a recommendation [is] made as to the steps that should be taken by the agency to bring it into proper compliance."[253] This "ombudsman-like" function is not formally assigned to OIP and is not publicized at all. The only official reference to it appears in the Attorney General's annual report to Congress of the Department's compliance efforts. OIP processes only a handful of citizen complaint cases each year.[254]

Despite numerous changes in the form and scope of the Department's compliance-promoting FOIA role over the years, the reports to Congress filed by the Attorney General since 1979 show a steady numerical growth in the activity of OIP (and its predecessor entities) and a relatively constant distribution of resources among the several case-specific functions:[255]

Function	1979	1980	1981	1982	1983	1984	1985
Summary Informal Advice	581	859	950	1140	1325	1570	1753
In-Depth Consultation	10	7	9	12	15	15	15
Litigation Advice	20	48	30	75	80	100	100
Citizen Complaints	30	35	25	9	7	8	14

The quantitative summary of the activity over this period of course provides no insight into the substance of the advice given or the general policy perspective from which the functions are approached. The Department has always been understood to have an institutional character naturally more disposed to the operational, as well as the political, interests of the agencies than to broad principles of openness in government.[256] Nevertheless, given its general law enforcement orientation and its distance from most administration, the Department has long been assumed to have a capacity to perform a moderately disinterested compliance-promoting function under FOIA.[257] Beyond wide agreement as to the delicate basis of this capacity and its effect generally on Departmental FOIA policy, it is difficult to identify any consensus, either positive or negative, with respect to overall quality of the compliance effort unrelated to common perceptions of the political posture of the Department at the highest levels.[258] The broad terms and purposes of the Act, even after 20 years of court decisions, remain susceptible to interpretative dispute and their implementation continues to depend on the exercise of discretion. Thus, fixed views of a particular administration can be reflected in the guidance process.

2. The Ombudsman Concept

Serious consideration of the use of an ombudsman in the American administrative process can be traced to the pioneering studies of Walter Gellhorn in the mid-1960s.[259] This work spurred tremendous interest in the ombudsman model and provided the conceptual foundation for a number of ambitious proposals for implementing the function in American government.[260] While many ombudsman-style offices were established in state governments in the years immediately following Professor Gellhorn's work, the concept did not take hold strongly at the federal level.[261] These studies and some related work from the same period by the Canadian political scientist, Donald C. Rowat, nevertheless remain the standard references.[262]

Subsequent implementation of the ombudsman concept, as well as the later literature, often departs sharply from the Scandinavian-based model explored most closely by Gellhorn and Rowat.[263] Some ombudsman or "citizen advocate" offices that exist today bear only the loosest resemblance to this classic model. This is not to suggest that such offices are in any way flawed. Rather, it is simply to recognize the need to establish a working definition for a concept that is inherently imprecise and a term that is often used casually. Departures from the model should not be assumed to be undesirable, but instead points that warrant closer analysis in deciding whether the generally-assumed values of the system will be realized in the particular application.[264] Given the parliamentary system origin of the concept, it is virtually certain that some modification would be necessary in any American implementation.

A three-part description formulated by Professor Rowat represents a strong and, therefore analytically valuable, definition of the office:

> (1) The Ombudsman is an independent and non-partisan officer of the legislature,

> usually provided for in the constitution, who supervises the administration;
>
> (2) he deals with specific complaints from the public against administrative injustice and maladministration; and
>
> (3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action.[265]

Reduced to its essential features and modified to eliminate the parliamentary system base, the American version of the Ombudsman would be an independent officer with authority, on the basis of citizen complaints, to investigate specific administrative action and to criticize but not compel a change in the result.[266]

Beyond this description lie seemingly endless issues of detail: the source and nature of the appointment, the qualifications for appointment, the formality of the complaint-handling process, the scope of the investigative power, and the relationship of the function to other institutions and processes. Even more perplexing are numerous questions related to the basis for the essential institutional ability to produce results through persuasion rather than compulsion. Much of the recent literature in the area is abstract and theoretical.[267] The dearth of empirical research in the field makes the gap between theory and practice even more difficult to bridge.[268] Finally vast differences in the types of administrative problems to which the ombudsman function has been applied often make comparisons problematic and analogies tenuous at best.[269]

The essence of the concept--both its potential awkwardnesses and its appealing simplicity--is well captured by Professor Gellhorn's rhetorical exchange. He asks:

> Could the complexities of public administration be grasped by outsiders? Would external critics constitute simply a further thickness of bureaucracy, adding to government cost but not capabilities? Would this country's political temper permit appointment of entirely apolitical observers of inner workings? Could external critics, armed only with the power of reason, hope to prevail over intransigent officials?[270]

He answers:

> External critics function most effectively when governmental administration is already reasonably good and when a consensus of expectations already exist about ethical and qualitative standards in the public service....

> They would not be propounders of wholly untried ideas inspired by novel attitudes toward governmental responsibilities. They would instead be commentators upon departures from established norms, advisers about how to achieve widely desired ends.... [T]he critic would have no operating responsibilities and no power to formulate initial judgments or to revise those made by others. The critic's authority would not be that of super-administrator, capable of bending administration to suit his will. Persons aggrieved by administrative action or inaction would not encounter the critic as an added layer of administration, through which they would have to struggle to reach the courts. They could, if they chose, ignore the critic altogether in order to pursue whatever remedies, judicial or otherwise, they thought more advantageous. The critic would be accessible, but not obtrusive. Those who might desire an objective inquiry under the auspices of an authority detached from the administrative establishment could call upon the critic. That is all.[271]

Little else can be said with assurance; more detail only encumbers the basic operating principle.

It is tempting to suggest that the only precondition for consideration of the use of an ombudsman should be an administrative system that yields a significant number of citizen complaints that are not resolved through other dispute resolution mechanisms or that burden such other mechanisms. After that, the question might simply be whether given the particular characteristics of the system, use of the ombudsman model offers a reasonable prospect of resolving efficiently a meaningful number of the outstanding complaints in light of experience with the concept elsewhere. Realistically, the ombudsman function would tolerate no more precise standard.[272]

Some portion of FOIA cases decided against the requester that are not pressed beyond the administrative appeal, as well as all cases that enter the judicial process, represent a pool of unresolved complaints against the government that may be amenable to treatment by an ombudsman.[273] To an extent, the earlier discussion of the Authority conciliation function suggests how the dispute resolution process could be advanced in this fashion.[274] The possible use of this function unassociated with an adjudicative agency, however, warrants a fuller analysis. Consideration of the use of ombudsmen in other federal settings will be helpful for this purpose, but given the uniqueness of the access dispute, assessment of the use of the ombudsman model in other freedom of information systems, most notably in Canada, offers the most helpful comparisons.[275]

3. Current Federal Agency Use of the Ombudsman

Any attempt to survey the existing ombudsman schemes immediately encounters the problem that some complaint-handling mechanisms that closely follow the classical model are not described as ombudsman systems and that some that depart significantly from that model are.[276] Moreover, an apparent longstanding reluctance at the federal level to use officially the term "ombudsman," makes it particularly difficult to identify complaint-handling mechanisms that have many, but not necessarily all, of the classical features. Virtually every federal agency receives citizen complaints and, under certain circumstances, responds to them through an ombudsman-like mechanism: someone outside the routine of administration makes an informal inquiry on behalf of the complainant. There is every reason to believe that these mechanisms produce desirable results, but their complete informality, and often their institutional obscurity, make it impossible to evaluate meaningfully their success as complaint processors.[277]

Two federal agency complaint-handling offices are statutorily termed "ombudsmen" and one major agency complaint office is termed by regulation an "ombudsman." These offices provide a structure and regularity for the function that makes it possible to assess, at least tentatively, their fit with the federal establishment. Additionally, there is one federally-mandated, and thus agency-monitored, program for a special-function state ombudsman. Finally, the House-passed Social Security Reform Act of 1986 establishes an Office of Beneficiary Ombudsman with the revamped Social Security Administration.[278]

a. The Taxpayer Ombudsman (1977)

The largest and most active federal ombudsman office is the Taxpayer Ombudsman in the Problem Resolution Program (PRP) of the Internal Revenue Service. The PRP was established in 1977 "to handle taxpayer complaints that were not promptly or properly resolved through normal procedures, or those problems which taxpayers believed had not received appropriate attention."[279] Additionally, the PRP is responsible "for identifying the causes of problems so corrective action can be taken" and "for representing taxpayers' interest and concerns within the Service during program development and implementation."[280] Complaints within the jurisdiction of the PRP include late or missing refunds, erroneous billings, unclear notices and letters, and certain examination and collection issues.[281] The PRP does not undertake to handle substantive technical or legal issues that are intended to be resolved through normal appeals procedures.[282] In fiscal 1984, the office received 326,000 taxpayer complaints, and in fiscal 1985, problems associated with a new computer system pushed the number over 500,000.[283]

Complaints otherwise within the jurisdiction of the PRP are accepted into the program on the basis of criteria that take account of the length of time that has past since the taxpayer could reasonably expect a response or corrective action based on a filing with or complaint made to an operational office. Each complaint is documented, given a control number, and entered into a computer system. The complaint is then forwarded to the IRS component responsible for the matter. The taxpayer is kept informed of the progress of the case and the PRP complaint file remains open until PRP determines that the problem has been resolved. Surveys conducted by PRP indicate a 90% rate of public satisfaction with the program.[284]

The Taxpayer Ombudsman, who is on the Commissioner's immediate staff, is the head of the PRP.[285] The PRP at the National Office level is a part of the Taxpayer Service Division. The Ombudsman office was established in 1980 to give the existing PRP greater visibility and independence.[286] The program is publicized through television, radio, magazine and newspaper ads, as well as in IRS taxpayer publications. Largely as the result of internal publicity, the majority of PRP cases are referred by IRS employees.[287]

The Problem Resolution Staff of the Office of the Ombudsman consists of a Director, a Special Projects Coordinator, a supervisory Program Analyst and eight program analysts.[288] Among other functions, this National Office level staff monitors the overall program that consists of only 195 budgeted positions in the district and regional offices.[289] The program is thus able to handle the several hundred thousand complaints received annually only by channeling the complaints to the source of the problem and then monitoring the response of the source. Unlike the classical ombudsman who performs an independent review and then seeks to persuade on the basis of his conclusions from the review, the Taxpayer Ombudsman normally sets in motion a re-examination at the operational level and monitors the outcome. Because the problems handled in the program generally arise from mechanical errors in filing or processing rather than legal or policy judgments, this approach seems entirely adequate.[290]

The Taxpayer Ombudsman is non-statutory. The function has, however, received Congressional encouragement and praise. In fact, it is widely assumed that if the office were administratively discontinued, it would be legislatively reconstituted.[291]

b. The Panama Canal Ombudsman (1979)

The Panama Canal Act of 1979, implementing the Panama Canal Treaty, establishes within the executive branch a Commission to maintain and operate the canal and its related facilities.[292] In addition to various Commission administrative positions, the Act establishes within the Commission an Office of Ombudsman. The Ombudsman is authorized "to receive individual complaints, grievances, requests, and suggestions of employees (and their dependents) of the Commission and other departments and agencies of the United States ... conducting operation before October 1, 1979 [in the Canal Zone] concerning administrative problems, inefficiencies, and conflicts caused within the departments and agencies of the United States ... as a result of the implementation of the Panama Canal Treaty of 1977 and related agreements."[293] The ombudsman is appointed by the Commission and has authority to "make findings" and "render assistance" with respect to any complaint and "make appropriate recommendations to the Commission."[294] The legislation also provides that establishment of the office "shall not affect any procedures for grievances, appeals, or administrative matters in any ... provision of law or ... regulation."[295]

The office was apparently established to handle anticipated problems resulting from the transfer of functions and employees from the Panama Canal Company and the Canal Zone government to the Commission. The jurisdiction of the ombudsman is thus extremely limited and the problems extraordinarily specialized. The Ombudsman is physically located in the Canal Zone and reported handling 1962 matters in fiscal year 1985.[296] The Office terminates upon the expiration of the Panama Canal Treaty.

c. The Resource Conservation and Recovery Act Ombudsman (1984)

The Resource Conservation and Recovery Act directs the Administrator of the Environmental Protection Agency to establish an Office of Ombudsman "to receive individual complaints, grievances, [and] requests for information submitted by any person with respect to any program or requirement under [the hazardous waste management laws and Superfund].[297] The Ombudsman is authorized to "render assistance" with respect to complaints and to "make appropriate recommendations to the Administrator."[298] The legislation also provides that the establishment of the Office "shall not affect any procedures for grievances, appeals, or administrative matters in any other provision ... of law or ... regulation."[299]

Because of administrative delay within EPA, the Office was not established and filled until May 12th of this year. The Office, which has only begun to operate, consists of the

Ombudsman, a part-time professional, and clerical support. It is in the process of establishing an operating system and has begun to publicize its existence, including the availability of toll-free telephone number.[300] Under the legislation, the Office ceases to exist four years after November 8, 1984, the date of enactment.[301]

d. Federally-Mandated State Ombudsman for Long-Term Care for the Elderly

Certain federal financial assistance to state supported facilities for long-term care for older individuals administered by the Department of Health and Human Services[302] is conditioned upon the state establishing a "long-term care ombudsman program" which provides an individual who will:

> (i) investigate and resolve complaints made by or on behalf of older individuals who are residents of long-term care facilities relating to administrative action which may adversely affect the health, safety, welfare, and rights of such residents;
>
> (ii) monitor the development and implementation of Federal, State, and local laws, regulations, and policies with respect to long-term care facilities in that State;
>
> (iii) provide information as appropriate to public agencies regarding the problems of older individuals residing in long-term care facilities;
>
> (iv) provide for training staff and volunteers and promote the development of citizen organizations to participate in the ombudsman program; and
>
> (v) carry out such other activities as the Commissioner [on Aging] deems appropriate.[303]

While the general duties assigned to these officials are traditional ombudsman-like functions, the settings in which they act are quite removed from typical federal administration. The mandate arose largely from the success of some state-initiated programs in the area. It appears that the quality of the programs varies from state to state, but on the whole the mandate is desirable.

e. The Proposed Social Security Beneficiary Ombudsman

The House-passed version of the Social Security Reform Act of 1986 establishes the Social Security Administration as an independent agency in the executive branch.[304] Under the bill, a Presidentially-appointed Board governs the Administration. Within the Administration there is created an Office of the Beneficiary Ombudsman, headed by an ombudsman appointed by the Board. The Ombudsman is directed to:

> (A) to represent within the Administration's decisionmaking process the interests and concerns of beneficiaries under the old-age, survivors, and disability insurance program under title II and the supplemental security income program under title XVI;
>
> (B) to review the Administration's policies and procedures for possible adverse effects on such beneficiaries;
>
> (C) to recommend within the Administration's decisionmaking process changes in policies which have caused problems for such beneficiaries;
>
> (D) to help resolve the problems under such programs of individual beneficiaries in unusual or difficult circumstances as determined by the Commissioner; and
>
> (E) to represent within the Administration's decisionmaking process the views of beneficiaries in the design of forms and the issuance of instructions.[305]

The functions assigned by the bill are similar to those of the Taxpayer Ombudsman. The systems of administration are similar in both the volume of actions taken and their importance to the affected parties and in the potential for error or misunderstanding. The proposed Beneficiary Ombudsman, like the Taxpayer Ombudsman, would act on individual complaints only in certain circumstances and would seek to identify systemic problems and represent affected interests in the policymaking process. The legislation also directs the Board to assure sufficient staff for the office and contemplates field as well as central office personnel.[306]

4. Use of the Ombudsman in Access Disputes

The ombudsman model, as such, is not used in any state freedom of information scheme. The New York State Committee on Open

Government, discussed earlier,[307] does however function in some ways as an ombudsman. The most fully developed ombudsman schemes for access disputes are foreign. The Canadian and Australian freedom of information acts were based in large part on the United States act and experience in its administration. Both use an ombudsman as a dispute processor.

a. The Canadian Commissioner of Information

An earlier section of this study describes briefly the dispute resolution structure of the Canadian Access to Information Act and broadly the role of the Information Commissioner, an ombudsman office based closely on the classical model.[308] The experience of the Commissioner's Office in the first three years of operation under the Canadian Act provides a valuable opportunity to consider in some detail the ombudsman function applied to access disputes.

Under the Canadian Act, a party may complain to the Commissioner of the failure of a government institution (agency) to comply with a substantive or procedural aspect of the access law, including time requirements and fee provisions.[309] A complaint to the Commissioner is a prerequisite to seeking judicial review under the Act of the agency action. The Commissioner is obliged to investigate every complaint.[310] Complaints are initially received in person, by toll-free telephone, or in writing, but are always reduced to writing when a file is opened. Each opened file is immediately assigned to an investigator and entered into a computerized tracking system.[311] When the investigation is begun, the investigator undertakes to collect informally from the complainant and the agency as much additional information concerning the complained-of action or inaction as is possible. Where required by the nature of the complaint, the records in question are normally examined in the course of an investigation.

When a complaint appears justifiable, attempts are made to resolve it during the investigation.[312] This may include sending a report of tentative findings to an agency official. Successfully resolved complaints of this type are classified by the Commissioner as "Supportable--Resolution Negotiated."[313] When a complaint is justifiable, but not amenable to informal resolution, a report is sent to the agency, and these cases are classified "Supportable--Report to Minister."[314] Many of these complaints are thereafter resolved by the agency, particularly complaints of delay where the records are ultimately released. If the complaint does not appear supportable, the complainant is notified and given an opportunity to "make representations." Unless the argumentation of the complainant persuades the Commissioner, the complaint is dismissed and classified "Unsupportable--Dismissed."[315]

In the three year period since the act became effective, the number of complaints closed and their dispositions were as follows:[316]

1983

Finding	Well-Founded	Not Supportable	No Finding	Total
Number	6	15	25	46
Percent	13.04%	32.61%	54.35%	100%

1984

Finding	Well-Founded	Supportable	Not Supportable	Total
Number	21	55	113	189
Percent	11.11%	29.10%	59.79%	100%

1985

Finding	Well-Founded	Supportable	Not Supportable	Total
Number	55	41	194	290
Percent	18.97%	14.13%	66.90%	100%

For the complaints closed in the last two years, the government action taken was as follows:[317]

Well-Founded Complaints

	1984			1985		
Category	Report to Minister			Report to Minister		
Substantive	Resolved		Disputed	Resolved		Disputed
	in full	in part		in full	in part	
	3	1	3	6	13	4
Delay	Not Disputed		Disputed	Not Disputed		Disputed
	14		--	26		4

Supportable Complaints

	1984			1985		
Category	Negotiated		Discontinued	Negotiated		Discontinued
Substantive	Resolved in full	Resolved in part	No Action	Resolved in full	Resolved in part	No Action
	19	22	3	5	27	3
Delay	Late Disclosure		No Action	Late Disclosure		No Action
	2		1	--		1

Not Supportable Complaints

	1984		1985	
Category	Dismissed	Discontinued	Dismissed	Discontinued
Substantive	No Action		No Action	
	54	4	109	5
Delay	No Action		No Action	
	22	2	28	3

These figures only provide a skeletal view of quantity and impact of the Commissioners. The details would provide insight as well. Yet within the limitations of assessing the results only statistically, it appears that the Commissioner has succeeded in bringing some cases to a more favorable resolution for the complainant that the original agency action. There is, however, only limited data available that would reflect what proportion of the well-founded or supportable cases were subsequently taken to court or, also importantly, what proportion of the non-supportable cases reached court.[318] Either figure would be helpful in assessing the success of the system in limiting the number of cases that require judicial treatment. In any event, it is arguable that the relatively few access cases totally that have reached the Canadian courts thus far would not represent a reliable sample. It is clear nonetheless that in three years the Information Commissioner has produced significant case-specific, if not systemic, results.[319]

The Commissioner's office consists of the Commissioner, two Assistant Commissioners, a Legal Counsel, a Director of Complaint Investigations, eight investigators, an administrative assistant to the Commissioner and a five-person support staff.[320] The Commissioner is appointed for a term of seven years by the Governor in Council, after approval by a vote of both the Senate and the House of Commons. Administrative staff in the financial, personnel, and communications areas is shared with the Office of the Privacy Commissioner.

The workload of the Office is affected significantly by the volume of records at issue in a particular complaint, as well as by factors of complexity and novelty. Investigators carry a caseload of 20-40 complaints and open the investigations in the order in which the complaints are received.[321] The order is not necessarily preserved as the investigation proceeds. Newer, but easier, cases are often resolved ahead of older, but more difficult ones. Of the 645 complaint files opened between July 1, 1983 and March 31, 1986, the range of elapsed time between receipt of a complaint to a report to the complainant was roughly from one month to twenty-five months; the median elapsed time was approximately four months; and the mean time five months.[322] For files closed in the fiscal year ending March 31, 1986, investigator time averaged roughly 25 hours per case.[323] The Commissioner's expressed goal for processing time is two to three months.[324]

In addition to the complaint-processing function, the Commissioner is authorized to bring, on behalf of a complainant, an action for judicial review of an agency decision on a complaint found to be supportable where the agency has rejected the report.[325] This function departs significantly from the classical ombudsman model. As of May, 1986, the Commissioner had exercised this authority in four cases and had intervened in three others. The Commissioner is also authorized to make special reports to the Parliament.

The Access to Information Act is currently undergoing a mandatory three-year Parliamentary review. It appears that the Commissioner will receive high marks for putting into operation a previously untested procedural system under new and controversial substantive legislation. The thoroughness and firm impartiality that the Commissioner has come to stand for, however, also forms the basis for some criticism. With rapidly growing numbers of complaints, acting on each complaint fully has produced a degree of delay that even the Commission considers undesirable.[326] This appears to be largely a resource problem. Additionally, the Commissioner has been criticized in some quarters for taking too neutral a posture. These critics argue that the Commissioner should function primarily as a requester advocate.[327] Both from the standpoint of the traditional ombudsman model and the nature of the access dispute, the Commission argues that the role would be inappropriate.[328]

b. The Australian Commonwealth Ombudsman

The Australian Freedom of Information Act,[329] which became effective in December 1982, follows the American model of two-levels of agency consideration of a request before external review. External review, as in both the American and the Canadian systems, culminates with a judicial proceeding. Unlike either the American or Canadian systems, however, an additional level of review is available in most cases through the Administrative Appeals Tribunal.[330] For the classes of cases not subject to this level of intermediate review, a form of advisory review is available through the Documents Review Tribunal.[331] Before proceeding in either forum, a requester may complain to the Commonwealth Ombudsman.[332] A complaint to the Ombudsman, however, is not a prerequisite either to intermediate administrative reivew or final judicial review.

The Commonwealth Ombudsman, unlike the Canadian Information Commissioner, is a general rather than special purpose ombudsman. His office, established under the Ombudsman Act of 1976,[333] follows the Scandinavian model. His freedom of information functions flow in part from his general authority and in part from special provisions of the Freedom of Information Act. These functions are (1) investigating complaints concerning agency performance under the Act, (2) reporting to the Public Service Board certain matters of misconduct, (3) representing requesters before the Administrative Appeals Tribunal and (4) reporting annually to Parliament.[334]

The FOI functions of the Ombudsman are conducted under the supervision of a Deputy Ombudsman whose jurisdiction includes matters other than freedom of information.[335] The staff consists of approximately seven investigators and two administrative/clerical employees.[336] Roughly 20% of the staff resources are devoted to freedom of information matters, and virtually all of these resources are devoted to complaint processing.[337] In the period since the Act became effective the number of FOI complaint files opened annually were as follows:[338]

1983	1984	1985	1986
35	70	142	91

In addition to these "formal" (written) complaints, roughly 1500 oral complaints were also received, as well as a number of formal complaints that had an FOI component but which dealt primarily with other matters within the Ombudsman's jurisdiction.[339]

Once an FOI complaint file has been opened an investigator makes an initial contact with the agency, by letter or telephone depending on the nature of the complaint, to advise of the complaint and to obtain a preliminary response. "[W]hen matters [can] be resolved informally over the phone, with little or no paperwork, that course [is] followed; where matters [can] not be resolved in this manner, an investigation might typically involve correspondence with both agency and complainant (e.g., to clarify issues, test agency propositions, or explore whether any consensus existed), examination of files concerning the agency's processing of the request, and examination of documents to which access has been refused."[340] In the course of the investigation, the matter is often brought to an informal resolution. If the matter cannot be resolved informally, the office usually reports by letter the results of the investigation. Rarely does the office issue a formal report.[341]

The Ombudsman describes the value of complaint processing function in FOI cases as follows:

> Before the parties even consider having the AAT resolve a dispute, Ombudsman investigation of the applicant's complaint can offer tangible benefits to both applicant and agency. Like the AAT, my office is expected to make an impartial and objective assessment of the documents and the alleged interests of both parties. Our investigation should clarify exactly what documents are required, and at least lead to greater precision in the reasons advanced for the refusal to give access and in articulating the countervailing public interest served by release. Inspection of the relevant documents permits my office to offer constructive advice to both parties which often narrows

> the dispute and in some cases has resolved it.
>
> * * *
>
> Our intervention can prevent disputes from unnecessarily going to the AAT; and, in those cases where there are issues best resolved by a tribunal or court, it is possible, should we first investigate, that there may result better identification of relevant evidence and greater precision in defining the issues.[342]

Of the complaints processed to conclusion from among the total 339 complaints received through June 30, 1986, the results have been categorized by the Ombudsman as follows:[343]

Outcome	Percentage
Further explanation or clarification of matters in dispute	32%
Process expedited following complaint of delay	8
Increased access to documents	15
Procedure improved/criticized/reviewed	16
Finding of no defective administration	19
Charges reduced/refunded	1
Mediation role	9

Of these complaints, approximately half involved questions of exemptions and the remainder involved complaints of delay or other failures in administration.[344] Normally, the office does not intervene in cases until agency processing has been completed. Where special "disadvantage" to the requester would result from the delay, the office may proceed before final agency action.[345] The office does undertake or complete investigations where the requester has appealed to the AAT.[346] Only on one occasion has the Ombudsman exercised his authority to represent a requester before the AAT. The Ombudsman has never exercised his authority to report misconduct directly to the Public Service Board.

5. A Proposal for an FOIA Ombudsman

As suggested earlier in this study, exclusive reliance on judicial proceedings for resolution of access claims remaining in disputes after final agency action limits the practical availability of neutral intervention to those parties who can afford the cost and delay inherent in that process and forces, in many cases, even those parties to use a mechanism more complex and formal than may be necessary to resolve their particular claim.[347] If the establishment of an administrative tribunal as a court substitute is, on balance, considered undesirable or infeasible, the implementation of a variant of the Canadian information ombudsman may provide some relief from the burdens of judicial proceedings and should be considered as an alternative to the Authority.

a. The Functions of an American FOIA Ombudsman

Given the variety of settings in which the ombudsman is used and the variation in functions assigned to different ombudsmen, adaptation of the model to FOIA requires consideration not only of the particular needs of an access case but also of the governmental structure in which the dispute arises. The goals of the system should be to provide: (1) an objective evaluation of disputes now excluded as a practical matter from the judicial process or forced into that process because of the lack of an alternative, (2) an opportunity for possible informal resolution of those disputes, and (3) a mechanism for the identification of systemic access problems.[348] These goals could be accomplished only by a system with a jurisdiction and scope of authority sufficiently limited to preclude the generation of an unmanageable workload and to avoid the perception of the ombudsman as a primary decisionmaker in the FOIA process. Moreover, accomplishment of these goals would depend upon an institutional capacity to differentiate among the needs of categories of complaints and deploy resources on the basis of those differentiations. Finally, their accomplishment would require an office of sufficient stature and independence to both warrant requester confidence and assure agency respect.

b. Jurisdiction and Scope of Authority

As discussed earlier, a large proportion of complaints with respect to agency implementation of FOIA concern processing delays. These complaints are not now effectively dealt with by the courts and there is little reason to believe that any action other than a reallocation of resources would produce different results systemically.[349] On occasion, however, delay is attributable to factors other than those which have become acceptable in FOIA administration. Delay for the purpose of undermining the time-value of information, for example, is a flagrant abuse. These situations are more susceptible to case-specific intervention. For these reasons, as well as for workload control and considerations of primary jurisdiction, ombudsman intervention should not occur until the conclusion of agency processing, unless a complaint alleges an extraordinary issue of delay or asserts that a dispute concerning a substantive, but ancillary, issue such as fee or fee waiver is delaying the processing of the request.[350] Thus, in most cases the ombudsman will be addressing a complaint in a case in which a final agency determination has been made and a fully-developed case file exists at the agency.

The ombudsman would nevertheless find it necessary to process every complaint in a limited fashion to make the jurisdictional determination. While this could represent a significant administrative task, it would seem entirely justifiable not only as a essential step in limiting jurisdiction but also as an auditing mechanism that could identify general problem areas.[351] A considerable number of contacts with the ombudsman would likely be in the nature of inquiries rather than complaints. These "where" or "how to" questions should also be handled and would probably consume little time of an experienced staff.[352]

In complaints within the scope of his jurisdiction, the ombudsman's formal authority should be limited to investigating and reporting. He should have access to knowledgeable persons within the complained-against agency and, when necessary, to the case file and the disputed records, which the ombudsman would be required to keep confidential. In cases that are not resolved in the course of the investigation, the ombudsman would report his findings to the complainant and the agency official responsible for the action. He would possess no power to compel agency adherence to his views, nor should his report be given deference in any subsequent judicial proceeding.[353] Complaining to the Ombudsman would not be a prerequisite to the judicial remedy and the Ombudsman would have no authority to sue on behalf of a complainant.[354]

c. Informal Resolution

At any point in an investigation that the ombudsman deemed it appropriate to do so, he would be free to seek to persuade the agency or the requester informally of the desirability of a particular resolution of the dispute.[355] In the case of persuasion directed toward an agency, the ombudsman's position might be based on his conclusion, for example, that the requested records are non-exempt or that partial discretionary disclosure of arguably exempt records could satisfy the requester without harm to the agency or another protected interest. In the case of persuasion directed toward the requester, the ombudsman's position might be based on his view that the records the requester seeks are of a category so broadly exempt that the little information that might ultimately be released would not justify the processing fees or that a mass of records that the requester seeks does not contain any (or any non-exempt) information of the kind sought. Under certain circumstances the ombudsman might even bring together the requester and an agency official to better focus the complaint and to exchange views on how to bring the matter to a fair and expeditious conclusion. No useful purpose would be served by confining the ombudsman to particular methods for resolving a complaint short of reporting. Experience would establish the boundaries.[356]

d. The Posture of the Ombudsman

Ombudsmen are sometimes referred to as "citizen advocates." If in the FOIA context that translates to "requester advocate," the ombudsmen will have difficulty maintaining sufficient credibility with the agencies to persuade effectively. If on the other hand the ombudsman becomes "agency apologist," public confidence in the integrity of the process will be lost. It is tempting to suggest that the proper posture for the ombudsman to assume is "advocate for the policies of the Act." If the neutral implication of that phrase had meaning, then that standard would be the desirable one--a commitment to openness in government subject to respect for the legitimate interests protected by the exemptions. In practice, the content of those words is often in doubt and if sought to be used seriously by the ombudsman to guide his conduct could involve him in the resolution of fundamental questions of policy.[357] It is generally agreed that an ombudsman must "eschew controversial questions of momentous policy; [his] function is not that of the policymaker, innovator or advocate of social change, but that of testing administration by accepted standards."[358] The FOIA ombudsman would have at his disposal a well-developed, if complex, body of caselaw to apply to the issues presented to him. When acting under his reporting authority, he should generally limit himself to those standards and, where there appears to be no controlling standard, he should acknowledge the uncertainty. Even when acting less formally he should be sensitive to the important relationship between the accepted norm and his persuasive authority.

e. The Position of the Ombudsman in Government

The two most important institutional characteristics of the FOIA ombudsman would be independence and stature--independence to promote the objective consideration of complaints and stature to enhance the persuasive authority of the office. Inasmuch as the office exercises no binding decisional authority, stature is arguably the more important of the two characteristics.

A free-standing ombudsman appointed by the President or the Congress to fill a statutorily-created office represents one extreme of positioning the ombudsman in government.[359] Independence would depend to some extent upon the nature of the appointment. Stature would flow from the high-level appointment and the office itself, as well as from the individual's background and experience. At the other extreme lies the creation of an office by executive order or agency regulation and the placement of the office within an existing administrative structure.[360] Upon reflection the extremes may not be as far apart as might be first assumed. What is sacrificed in terms of independence with the non-statutory ombudsman may be compensated for by the stature that would flow from a strategically-placed office having the support of the administration. This seems particularly important where the FOIA Ombudsman, unlike, for example, the Taxpayer Ombudsman, is not an institutional official but rather a cross-institutional official.[361] Whether statutory or non-statutory, legislative or executive, the additional consideration of efficiency makes desirable the placement of the office in an existing administrative structure.[362] While the advantages and disadvantages of these permutations can be addressed in broad terms, it is difficult to decide on the basis of those abstractions. A more practical approach is to consider whether an existing structure could provide a suitable setting for the office, and if not, why?

f. The Ombudsman Within the Department of Justice

The Department of Justice currently performs two major functions under FOIA on essentially a government-wide basis. It defends most agencies in FOIA litigation, and it counsels most agencies with respect to their obligations under the Act. As noted above, incident to those functions and its implicit statutory compliance-promoting function, it performs on an extremely limited scale an access ombudsman-like function through the Office of Information and Privacy (OIP). Could that function be expanded and modified to attain within the Department an effective FOIA Ombudsman? To answer that question, it is necessary as a preliminary matter to understand how current OIP citizen complaint activity falls short.

First, the complaint function is not performed on a scale sufficient to have any meaningful impact. Even recognizing the imprecision and possible inconsistencies in accounting method over the years, it seems fair to say that the number of citizen complaints handled by OIP and its predecessors has been miniscule, ranging from roughly 10 to 20 per year.[363] Undoubtedly, this is due in large part to the absence of any complaint soliciting activity. In turn the apparent reluctance to publicize the availability of the service is due, in part, to the long-standing absence of a clear delineation within the Department of a repsonsibility to perform the service.[364]

Second, the function is performed on essentially an ad hoc basis and thus lacks the regularization that a meaningful complaint-handling system demands. In large part, this simply reflects the extremely small scale on which the activity is conducted. Nevertheless, basic questions such as the authority of the office to examine documents, the channels through which formal agency communications are to be made, and even the scope of the process itself are administratively finessed.[365]

Third, the function cannot effectively be performed by the Department given the current structure for carrying out its FOIA compliance-promoting role. Apart from the provision of general guidance in various forms, OIP gives case-specific advice to the agencies and the Civil Division. The advice is given in what is essentially an attorney-client or house counsel relationship. Without questioning the consistency of the activity with the policies of the Act, the existence of the relationship undermines at least the appearance of the performance of a neutral, complaint-handling function contemplated by the ombudsman model--not simply in specific cases that reach the office in both forms, but generally. Not as an ethical matter, but rather as a matter of necessary independence and public confidence in the integrity of the process, the two functions can not be performed under the same immediate supervision.

If Justice is otherwise a suitable setting for the ombudsman office, then these shortcomings are relatively easily correctable within the Department.[366] If Justice is not, then the modest ombudsman-like function now performed there should be terminated in favor of a more substantial system external to the Department. The issue, thus, should be the suitability of the Department as an institutional home for the FOIA ombudsman rather than of the sufficiency of the current ombudsman-like activity in OIP.

This question, as noted earlier, revolves around concerns of independence and stature. If the paramount concern were independence, then the Department should not be chosen; the appointment of a free-standing ombudsman by the President for a term of years with removal limited to cause would best serve that interest. But unlike the overriding need for independence in the case of a decisional substitute like the Authority, the persuasive capacity upon which the ombudsman depends can be enhanced by association with the highest authority in the administrative structure in which he operates. While no one official (not even the President) can be said to head a government-wide FOIA administrative hierarchy, the Attorney General bears the broadest responsibilities. His various FOIA roles give force to the views that are expressed by his subordinates. There are, of course, very real practical limits to this authority. Yet unless those limits are constantly tested by the work of a FOIA ombudsman, his association with the Attorney General should be advantageous.

If the ombudsman seeks only to encourage adherence to FOIA norms and avoids policy controversies, the need to resort to the authority of the Attorney General should be minimal. In fact, an ombudsman operating outside the chain of Departmental authority could find his positions to be at odds with the counseling or litigating positions of the Department. This is not to suggest, however, that the ombudsman's persuasive role should be limited to agency action that would trigger a Department "refusal to defend." The formal reporting authority itself has some force and, realistically, the ombudsman's opportunity for informal persuasion can never be more than that--an opportunity for persuasion.

The advantage that the ombudsman may gain from the association with the Department in dealing with the agencies could, of course, be offset in the overall process if the connection is perceived as evidence of disabling bias. This problem transcends FOIA policy changes at the Department that reflect political changes, though it may be exacerbated by them. It is the tension created by the combination of compliance and defense functions in the Department. If, in the long run, the Department's compliance role is considered valuable notwithstanding this tension, then it would seem ironic to allow the difficult-to-quantify risk of such perception to discourage the establishment of an office that could lead to a fuller and more visible performance of this function. On balance, the Department seems a reasonable choice.

The Office of FOIA Ombudsman could be established as a separate office reporting through the same channels as the Office of Information and Privacy which should maintain its current agency guidance and litigation support functions. The Attorney General presumably has authority to effect what would amount to a reorganization and expansion of a function now performed in OIP.[367] Given the need, however, for increased budgetary support and arguably for authority to conduct investigations, some legislative action may be necessary. With the possible exception of a Presidentially-established office, the creation of any such office outside the Department of Justice would clearly require legislation.

D. A Pilot Project

Any proposal for procedural reform, particularly a proposal that significantly alters the status quo, raises innumerable questions of detail and necessarily treads in areas of uncertainty. The Authority structure suggested earlier clearly fits that characterization. Even the alternative Ombudsman approach sets out only the rough contours. Apart from the prospect for refinement and improvement of the proposals through the process of criticism, consideration should be given to testing them through pilot projects.

For the Authority, a modest project of this nature could be structured by assigning an administrative law judge and an individual who could function as a conciliator to the Office of the Archivist of the United States. The ALJ and the conciliator would receive staff support from that office and the Archivist would function as the "Authority" head. Requesters receiving final denials from certain selected agencies would be informed of the existence of the project and of the opportunity to seek the consent of the agency for submission of the matter to the "Authority" rather than seeking de novo district court review. By agreeing to submit the matter, however, the requester would not waive the right to bring the court action if he remained unsatisfied after the "Authority" proceeding. Similarly, the agency would be free to refuse to comply with the decision if it was unsatisfied, thus forcing the requester to sue if he wished to pursue the matter.[368]

Rules of procedure for the "Authority" would have to be developed and a research method for the project defined. In this regard much could be learned from the court-annexed arbitration projects now operating in several federal court districts.[369] The major limitations of the project for the purposes of testing the Authority concept would be the non-binding nature of the proceeding and absence of any mechanism for forcing cases into the process. Yet these limitations would be difficult to overcome in a true pilot program.

For the Ombudsman, a pilot project simply could be established by the Department of Justice with the cooperation of few other agencies. Unlike the pilot project for the Authority, the project could operate under conditions that would be virtually identical to the full scale program, without requiring the waiver of any rights. The cooperating agencies would notify requesters by an acknowledgement letter in response to a request of the availability of the ombudsman. The Departmentally-established Ombudsman would then act on complaints received by investigation and reporting.

Apart from testing the particular proposals, either pilot would be a source of valuable data concerning access dispute processing. Without such projects much critical data for access policymaking simply cannot be obtained. Any pilot undertaken should be designed carefully to produce that information.[370]

E. Conclusion

At the heart of post-agency access dispute processing is the need for objectivity, some opportunity for document or index review, and careful application of a specialized body of law. This need is often in tension with the further need for prompt and cost-effective resolution of the dispute. The adjudicative entity recommended here offers a meaningful prospect for fulfilling these needs in a manner superior to that now provided by the federal district courts. The basic structure and function of the entity, rather than every detail of its operation, is the essence of the recommendation. The ombudsman function recommended alternatively likewise offers a meaningful prospect for meeting these needs in many cases short resort to adjudication but without any restriction of the existing judicial remedy. Within these recommendations lies the opportunity for improving the administration and ensuring the continued vitality of the public access system.

APPENDIX

FOIA Caseload and Case Processing

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Table 39. Exemption 1 Denials and Appeals - 1983
Table 40. Exemption 1 Denials and Appeals - 1984

TABLE 1

Court Filings and Terminations

	1980	1981	1982	1983	1984	1985	Total
Filed	627	507	381	454	479	565	3013
Terminated	558	530	450	429	466	573	3006

TABLE 2

Time Intervals/All Circuits

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	558	530	450	429	466	573
10% Less Than	2	2	2	2	2	2
Median	7	8	10	8	7	8
10% More Than	21	23	31	33	26	54
NO COURT ACTION						
Number of Cases	224	191	149	143	181	270
10% Less Than	2	1	2	1	1	1
Median	6	5	7	6	5	6
10% More Than	19	19	28	29	25	57
BEFORE PRETRIAL						
Number of Cases	278	281	259	239	250	273
10% Less Than	2	2	3	2	3	3
Median	8	9	11	9	8	9
10% More Than	18	23	30	33	22	54
DURING OR AFTER PRETRIAL						
Number of Cases	46	41	30	41	30	24
10% Less Than	5	3	6	4	4	4
Median	12	8	16	13	15	14
10% More Than	27	24	42	37	38	29
TRIAL						
Number of Cases	10	17	12	6	5	6
10% Less Than	1	8	2	6	*	*
Median	11	16	13	9	*	*
10% More Than	27	32	21	12	*	*

TABLE 3

Time Intervals/D.C. Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	214	221	188	180	178	211
10% Less Than	2	2	2	1	2	1
Median	6	6	8	7	6	7
10% More Than	15	20	29	29	19	22
NO COURT ACTION						
Number of Cases	88	92	61	66	74	103
10% Less Than	2	1	2	1	1	1
Median	5	4	6	5	5	4
10% More Than	14	19	23	29	19	24
BEFORE PRETRIAL						
Number of Cases	115	118	125	109	99	100
10% Less Than	2	3	3	2	3	3
Median	8	8	9	9	7	8
10% More Than	16	22	30	29	20	20
DURING OR AFTER PRETRIAL						
Number of Cases	10	8	1	4	4	8
10% Less Than	4	6	*	1	*	*
Median	10	7	*	4	*	*
10% More Than	25	15	*	14	*	*
TRIAL						
Number of Cases	1	3	1	1	1	*
10% Less Than	1	1	*	1	*	*
Median	2	15	*	11	*	*
10% More Than	2	16	*	11	*	*

TABLE 4

Time Intervals/1st Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	18	15	20	15	20	10
10% Less Than	4	2	2	1	2	2
Median	7	9	13	8	8	8
10% More Than	27	32	35	39	52	13
NO COURT ACTION						
Number of Cases	7	2	6	3	5	5
10% Less Than	2	1	*	1	*	*
Median	7	1	*	1	*	*
10% More Than	10	5	*	1	*	*
BEFORE PRETRIAL						
Number of Cases	6	9	10	8	12	5
10% Less Than	5	2	1	4	2	*
Median	7	9	13	10	5	*
10% More Than	13	20	35	28	52	*
DURING OR AFTER PRETRIAL						
Number of Cases	3	3	3	4	3	*
10% Less Than	1	1	*	1	*	*
Median	5	13	*	6	*	*
10% More Than	40	40	*	39	*	*
TRIAL						
Number of Cases	2	1	1	*	*	*
10% Less Than	1	1	*	*	*	*
Median	15	32	*	*	*	*
10% More Than	27	32	*	*	*	*

TABLE 5

Time Intervals/2nd Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	71	46	35	28	22	102
10% Less Than	1	1	3	3	1	7
Median	5	7	16	20	8	54
10% More Than	23	21	36	44	36	68
NO COURT ACTION						
Number of Cases	19	22	14	12	15	47
10% Less Than	1	2	2	2	1	6
Median	5	6	16	19	14	55
10% More Than	23	21	34	44	40	69
BEFORE PRETRIAL						
Number of Cases	43	19	17	9	5	50
10% Less Than	1	1	3	3	*	7
Median	4	11	17	27	*	54
10% More Than	18	26	29	46	*	66
DURING OR AFTER PRETRIAL						
Number of Cases	9	5	3	7	2	5
10% Less Than	4	1	*	8	*	*
Median	12	4	*	20	*	*
10% More Than	24	18	*	37	*	*
TRIAL						
Number of Cases	*	*	1	*	*	*
10% Less Than	*	*	*	*	*	*
Median	*	*	*	*	*	*
10% More Than	*	*	*	*	*	*

TABLE 6

Time Intervals/3rd Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	9	11	23	26	17	20
10% Less Than	1	1	1	3	1	1
Median	5	8	9	7	6	7
10% More Than	11	12	19	17	24	21
NO COURT ACTION						
Number of Cases	3	4	5	4	5	13
10% Less Than	1	1	*	1	*	1
Median	4	1	*	6	*	3
10% More Than	8	2	*	15	*	9
BEFORE PRETRIAL						
Number of Cases	4	6	13	16	8	6
10% Less Than	1	8	1	3	*	*
Median	5	11	11	7	*	*
10% More Than	18	12	18	17	*	*
DURING OR AFTER PRETRIAL						
Number of Cases	1	*	4	6	4	1
10% Less Than	1	*	*	5	*	*
Median	11	*	*	8	*	*
10% More Than	11	*	*	13	*	*
TRIAL						
Number of Cases	1	1	1	*	*	*
10% Less Than	1	1	*	*	*	*
Median	2	5	*	*	*	*
10% More Than	2	5	*	*	*	*

TABLE 7

Time Intervals/4th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	28	14	21	19	13	19
10% Less Than	4	1	2	1	1	1
Median	9	9	7	7	4	3
10% More Than	20	20	25	44	11	9
NO COURT ACTION						
Number of Cases	11	4	6	3	7	10
10% Less Than	2	1	*	1	*	1
Median	5	3	*	24	*	3
10% More Than	10	40	*	60	*	9
BEFORE PRETRIAL						
Number of Cases	12	7	11	12	5	8
10% Less Than	5	1	2	1	*	*
Median	10	10	11	6	*	*
10% More Than	19	13	28	44	*	*
DURING OR AFTER PRETRIAL						
Number of Cases	5	2	4	3	1	*
10% Less Than	10	1	*	1	*	*
Median	21	9	*	6	*	*
10% More Than	31	17	*	8	*	*
TRIAL						
Number of Cases	*	1	*	1	*	1
10% Less Than	*	1	*	1	*	*
Median	*	9	*	9	*	*
10% More Than	*	9	*	9	*	*

TABLE 8

Time Intervals/5th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	19	33	32	35	34	21
10% Less Than	2	1	1	3	1	2
Median	12	9	12	15	7	11
10% More Than	14	19	24	28	31	24
NO COURT ACTION						
Number of Cases	5	10	11	13	9	7
10% Less Than	1	1	1	1	*	*
Median	7	4	5	15	*	*
10% More Than	10	13	18	21	*	*
BEFORE PRETRIAL						
Number of Cases	12	17	19	18	21	12
10% Less Than	1	2	7	2	1	3
Median	11	12	15	9	6	11
10% More Than	13	19	24	32	19	24
DURING OR AFTER PRETRIAL						
Number of Cases	1	3	1	3	4	2
10% Less Than	1	1	*	1	*	*
Median	25	11	*	18	*	*
10% More Than	25	16	*	26	*	*
TRIAL						
Number of Cases	1	3	1	1	*	*
10% Less Than	1	1	*	1	*	*
Median	4	18	*	16	*	*
10% More Than	4	30	*	16	*	*

TABLE 9

Time Intervals/6th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	19	31	25	21	31	26
10% Less Than	1	3	2	2	2	1
Median	9	8	15	7	8	15
10% More Than	25	23	29	29	24	51
NO COURT ACTION						
Number of Cases	6	4	6	4	11	10
10% Less Than	1	1	*	1	1	1
Median	1	11	*	2	5	15
10% More Than	5	31	*	25	6	69
BEFORE PRETRIAL						
Number of Cases	11	21	16	11	16	11
10% Less Than	5	2	3	3	2	1
Median	13	9	17	7	11	17
10% More Than	18	20	28	13	21	48
DURING OR AFTER PRETRIAL						
Number of Cases	2	6	2	6	3	3
10% Less Than	1	4	*	2	*	*
Median	25	5	*	14	*	*
10% More Than	26	8	*	29	*	*
TRIAL						
Number of Cases	*	*	1	*	1	2
10% Less Than	*	*	*	*	*	*
Median	*	*	*	*	*	*
10% More Than	*	*	*	*	*	*

TABLE 10

Time Intervals/7th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	30	28	17	23	36	24
10% Less Than	2	4	5	1	3	1
Median	7	10	20	9	6	4
10% More Than	27	27	37	33	20	10
NO COURT ACTION						
Number of Cases	6	6	4	8	10	8
10% Less Than	2	1	*	1	1	*
Median	14	6	*	2	3	*
10% More Than	27	11	*	7	8	*
BEFORE PRETRIAL						
Number of Cases	20	16	11	13	23	14
10% Less Than	1	5	5	1	4	1
Median	5	9	9	15	9	5
10% More Than	28	26	30	35	27	9
DURING OR AFTER PRETRIAL						
Number of Cases	4	4	1	1	3	1
10% Less Than	1	1	*	1	*	*
Median	10	13	*	11	*	*
10% More Than	27	33	*	23	*	*
TRIAL						
Number of Cases	*	2	1	*	*	1
10% Less Than	*	1	*	*	*	*
Median	*	17	*	*	*	*
10% More Than	*	27	*	*	*	*

TABLE 11

Time Intervals/8th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	19	15	18	14	16	17
10% Less Than	3	4	2	1	1	3
Median	12	10	10	6	6	7
10% More Than	27	23	15	28	16	51
NO COURT ACTION						
Number of Cases	6	5	10	5	8	7
10% Less Than	2	4	1	1	*	*
Median	9	5	5	4	*	*
10% More Than	12	20	13	28	*	*
BEFORE PRETRIAL						
Number of Cases	10	8	7	8	6	8
10% Less Than	3	3	*	5	*	*
Median	10	13	*	13	*	*
10% More Than	21	23	*	17	*	*
DURING OR AFTER PRETRIAL						
Number of Cases	1	2	1	1	2	2
10% Less Than	1	1	*	1	*	*
Median	37	5	*	5	*	*
10% More Than	37	26	*	5	*	*
TRIAL						
Number of Cases	2	*	*	*	*	*
10% Less Than	1	*	*	*	*	*
Median	27	*	*	*	*	*
10% More Than	29	*	*	*	*	*

TABLE 12

Time Intervals/9th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	56	48	30	36	67	85
10% Less Than	2	2	4	1	3	2
Median	8	9	16	6	9	6
10% More Than	24	19	37	31	19	17
NO COURT ACTION						
Number of Cases	32	22	14	12	27	43
10% Less Than	2	1	2	1	1	1
Median	6	8	8	5	5	6
10% More Than	25	15	34	40	17	11
BEFORE PRETRIAL						
Number of Cases	19	22	10	20	38	40
10% Less Than	2	3	2	1	3	3
Median	8	10	17	6	10	7
10% More Than	19	23	51	17	17	17
DURING OR AFTER PRETRIAL						
Number of Cases	3	2	5	2	1	1
10% Less Than	1	1	*	1	*	*
Median	22	6	*	3	*	*
10% More Than	22	19	*	33	*	1
TRIAL						
Number of Cases	2	2	1	2	1	1
10% Less Than	1	1	*	1	*	*
Median	11	8	*	6	*	*
10% More Than	24	33	*	9	*	*

TABLE 13

Time Intervals/10th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	15	27	17	10	15	14
10% Less Than	2	1	2	1	4	1
Median	7	3	9	4	7	9
10% More Than	14	23	20	27	23	27
NO COURT ACTION						
Number of Cases	6	3	4	5	1	3
10% Less Than	1	1	*	1	*	*
Median	2	3	*	4	*	*
10% More Than	7	30	*	27	*	*
BEFORE PRETRIAL						
Number of Cases	4	18	8	3	10	9
10% Less Than	1	1	*	1	1	*
Median	6	1	*	4	6	*
10% More Than	27	15	*	19	15	*
DURING OR AFTER PRETRIAL						
Number of Cases	5	3	3	2	2	1
10% Less Than	5	1	*	1	*	*
Median	9	6	*	25	*	*
10% More Than	14	12	*	32	*	*
TRIAL						
Number of Cases	*	*	2	*	2	1
10% Less Than	*	*	*	*	*	*
Median	*	*	*	*	*	*
10% More Than	*	*	*	*	*	*

TABLE 14

Time Intervals/11th Circuit

	1980	1981	1982	1983	1984	1985
TOTAL CASES						
Number of Cases	60	41	24	22	17	24
10% Less Than	2	3	6	1	3	1
Median	7	10	12	7	11	8
10% More Than	10	16	29	23	16	47
NO COURT ACTION						
Number of Cases	35	17	8	8	9	14
10% Less Than	2	2	*	1	*	1
Median	5	9	*	7	*	7
10% More Than	10	15	*	19	*	47
BEFORE PRETRIAL						
Number of Cases	22	20	12	12	7	10
10% Less Than	1	2	6	1	*	1
Median	7	10	11	6	*	8
10% More Than	12	16	32	22	*	33
DURING OR AFTER PRETRIAL						
Number of Cases	2	3	2	1	1	*
10% Less Than	1	1	*	1	*	*
Median	14	11	*	33	*	*
10% More Than	14	11	*	33	*	*
TRIAL						
Number of Cases	1	1	2	1	*	*
10% Less Than	1	1	*	1	*	*
Median	1	27	*	12	*	*
10% More Than	1	27	*	12	*	*

TABLE 15

Disposition of Action

	1980	1981	1982	1983	1984	1985
Transfer	29	13	6	10	4	11
Remand	3	1	1	1	0	1
Dismissed, Want of Prosecution	19	8	22	11	16	15
Dismissed, Discont'd, Settled, Withdrawn	230	259	199	215	246	360
Judgment on Default	1	0	0	0	1	0
Judgment on Consent	9	6	5	7	2	7
Judgment on Motion Before Trial	253	224	204	177	182	170
Judgment on Jury Verdict	0	1	0	0	0	0
Judgment on Directed Verdict	0	0	0	0	0	1
Judgment on Court Trial	10	13	11	5	4	5
Other	4	5	2	3	11	3
TOTAL	558	530	450	429	466	573

TABLE 16

Procedural Progress at Termination

	1980	1981	1982	1983	1984	1985
Before Issue Joined	100	76	58	71	81	118
Motion Decided But Before Issue Joined	93	75	63	63	69	55
Issued Joined, No Other Court Action	121	114	90	90	97	132
Issue Joined, After Judgment of Court On Motion	186	206	196	164	183	236
Issue Joined After Pretrial But Before Trial	46	41	30	41	29	24
During Court Trial	2	3	0	1	0	1
During Jury Trial	0	0	0	0	0	1
After Court Trial	8	13	12	5	5	4
After Jury Trial	0	1	0	0	0	0
Other	2	1	1	2	2	2
TOTAL	558	530	450	429	466	573

TABLE 17

Judgment For

	1980	1981	1982	1983	1984	1985
Plaintiff	37	27	22	30	23	17
Defendant	242	214	197	166	146	139
Both	14	24	24	9	11	8
Total Known	293	265	223	205	180	164
Unknown	275	265	207	223	286	409
TOTAL	568	530	450	428	466	573

TABLE 18

Appellate Time Intervals/All Circuits

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	36	72	59	38	50	49	304
From Filing Notice to Filing Last Brief	5.9	5.4	5.2	4.5	4.6	4.5	
From Filing Last Brief to Hearing or Submission	1.7	1.9	2.8	2.4	2.8	2.8	
From Hearing or Submission to Final Disposition	1.0	1.8	1.3	1.7	2.3	1.5	
From Filing Notice of Appeal to Final Disposition	11.0	10.4	10.3	9.8	10.2	10.5	
From Filing in Lower Court to Final Disposition in Appellate Court	21.8	22.5	25.3	25.5	22.0	22.8	

TABLE 19

Appellate Time Intervals/D.C. Circuits

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	13	42	31	15	20	16	137
From Filing Notice to Filing Last Brief	6.1	5.8	5.2	4.9	4.9	5.0	
From Filing Last Brief to Hearing or Submission	1.4	2.0	2.0	2.1	2.8	2.8	
From Hearing or Submission to Final Disposition	0.8	1.6	0.8	1.7	3.5	1.2	
From Filing Notice of Appeal to Final Disposition	10.2	11.6	9.2	9.9	11.3	10.0	
From Filing in Lower Court to Final Disposition in Appellate Court	21.8	23.3	25.8	22.7	22.1	22.1	

TABLE 20

Appellate Time Intervals/1st Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	2	4	-	1	4	4	15
From Filing Notice to Filing Last Brief	-	2.6	-	2.8	2.7	3.5	
From Filing Last Brief to Hearing or Submission	-	0.7	-	2.5	0.7	0.4	
From Hearing or Submission to Final Disposition	0.0	3.0	-	1.3	2.3	3.0	
From Filing Notice of Appeal to Final Disposition	0.4	7.5	-	6.6	6.4	9.4	
From Filing in Lower Court to Final Disposition in Appellate Court	11.7	22.5	-	29.0	11.7	20.7	

TABLE 21

Appellate Time Intervals/2nd Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	4	6	2	4	2	1	19
From Filing Notice to Filing Last Brief	3.8	3.7	2.0	3.6	3.3	2.8	
From Filing Last Brief to Hearing or Submission	0.4	0.6	0.3	1.4	0.5	1.3	
From Hearing or Submission to Final Disposition	0.2	0.2	1.1	0.1	0.8	0.1	
From Filing Notice of Appeal to Final Disposition	4.4	4.5	3.7	4.8	5.3	4.2	
From Filing in Lower Court to Final Disposition in Appellate Court	8.9	12.4	19.9	11.5	26.6	11.4	

TABLE 22

Appellate Time Intervals/3rd Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	-	-	3	3	3	4	13
From Filing Notice to Filing Last Brief	-	-	4.3	3.9	3.5	2.2	
From Filing Last Brief to Hearing or Submission	-	-	3.8	3.2	2.3	0.2	
From Hearing or Submission to Final Disposition	-	-	2.3	0.3	1.3	0.3	
From Filing Notice of Appeal to Final Disposition	-	-	11.3	7.4	8.7	7.6	
From Filing in Lower Court to Final Disposition in Appellate Court	-	-	36.0	21.2	14.9	13.6	

TABLE 23

Appellate Time Intervals/4th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	3	2	1	1	2	1	10
From Filing Notice to Filing Last Brief	5.6	2.7	4.1	9.3	-	3.5	
From Filing Last Brief to Hearing or Submission	10.4	3.6	0.5	0.5	-	2.6	
From Hearing or Submission to Final Disposition	0.3	3.1	3.9	1.3	2.4	1.8	
From Filing Notice of Appeal to Final Disposition	17.1	11.4	8.5	11.1	8.6	7.9	
From Filing in Lower Court to Final Disposition in Appellate Court	26.9	22.1	18.2	17.2	15.1	12.2	

TABLE 24

Appellate Time Intervals/5th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	4	2	4	1	4	4	19
From Filing Notice to Filing Last Brief	5.9	2.7	5.1	2.9	3.0	3.5	
From Filing Last Brief to Hearing or Submission	3.2	3.6	2.9	2.4	0.8	1.7	
From Hearing or Submission to Final Disposition	4.5	3.1	1.5	3.1	0.4	0.5	
From Filing Notice of Appeal to Final Disposition	13.4	11.4	10.3	8.4	8.5	6.0	
From Filing in Lower Court to Final Disposition in Appellate Court	20.9	22.1	20.9	33.7	14.5	10.3	

TABLE 25

Appellate Time Intervals/6th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	2	1	-	2	5	3	13
From Filing Notice to Filing Last Brief	7.4	5.0	-	4.5	3.0	3.0	
From Filing Last Brief to Hearing or Submission	0.5	6.0	-	8.3	8.0	6.4	
From Hearing or Submission to Final Disposition	0.6	0.2	-	2.9	2.5	0.8	
From Filing Notice of Appeal to Final Disposition	25.4	11.2	-	19.4	13.9	12.5	
From Filing in Lower Court to Final Disposition in Appellate Court	29.6	39.3	-	37.1	24.6	33.6	

TABLE 26

Appellate Time Intervals/7th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	-	1	4	3	1	1	10
From Filing Notice to Filing Last Brief	-	18.7	9.8	3.7	2.5	2.2	
From Filing Last Brief to Hearing or Submission	-	5.4	1.3	2.4	11.4	0.3	
From Hearing or Submission to Final Disposition	-	16.1	1.2	1.9	0.6	3.3	
From Filing Notice of Appeal to Final Disposition	-	29.4	23.5	10.5	14.5	5.8	
From Filing in Lower Court to Final Disposition in Appellate Court	-	42.3	36.5	25.6	38.7	49.1	

TABLE 27

Appellate Time Intervals/8th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	2	2	1	-	1	1	7
From Filing Notice to Filing Last Brief	3.4	2.5	3.1	-	7.8	3.5	
From Filing Last Brief to Hearing or Submission	2.7	0.9	7.6	-	0.2	1.0	
From Hearing or Submission to Final Disposition	0.2	0.8	0.2	-	0.7	3.1	
From Filing Notice of Appeal to Final Disposition	9.6	6.3	10.9	-	8.7	7.6	
From Filing in Lower Court to Final Disposition in Appellate Court	16.1	17.1	22.7	-	25.6	17.5	

TABLE 28

Appellate Time Intervals/9th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	2	5	7	5	5	8	32
From Filing Notice to Filing Last Brief	5.7	7.4	5.6	6.9	6.3	5.4	
From Filing Last Brief to Hearing or Submission	6.7	8.5	3.0	3.5	3.0	3.0	
From Hearing or Submission to Final Disposition	0.5	3.8	1.3	2.1	2.6	1.5	
From Filing Notice of Appeal to Final Disposition	17.4	18.7	10.3	12.5	13.2	11.7	
From Filing in Lower Court to Final Disposition in Appellate Court	28.9	26.7	23.4	41.8	18.5	28.0	

TABLE 29

Appellate Time Intervals/10th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	1	1	2	-	-	3	7
From Filing Notice to Filing Last Brief	19.3	1.6	2.5	-	-	5.1	
From Filing Last Brief to Hearing or Submission	13.1	0.1	4.3	-	-	5.8	
From Hearing or Submission to Final Disposition	2.0	3.9	0.2	-	-	2.7	
From Filing Notice of Appeal to Final Disposition	34.4	5.6	7.2	-	-	17.2	
From Filing in Lower Court to Final Disposition in Appellate Court	42.2	6.5	13.0	-	-	26.9	

TABLE 30

Appellate Time Intervals/11th Circuit

	1980	1981	1982	1983	1984	1985	Total
Number of Cases	3	7	4	3	3	3	23
From Filing Notice to Filing Last Brief	6.2	6.3	6.5	6.0	5.5	3.5	
From Filing Last Brief to Hearing or Submission	2.6	1.2	4.1	5.5	3.8	4.9	
From Hearing or Submission to Final Disposition	3.9	2.6	2.4	1.1	0.8	7.1	
From Filing Notice of Appeal to Final Disposition	11.0	12.7	11.8	11.9	9.8	15.9	
From Filing in Lower Court to Final Disposition in Appellate Court	18.8	21.6	23.1	31.1	23.0	21.4	

TABLE 31

APPEALS DISPOSED OF AFTER HEARING OR SUBMISSION

	1980	1981	1982	1983	1984	1985
NUMBER OF CASES	59	67	58	37	47	44
AFFIRMED OR GRANTED	26	48	39	29	33	31
DISMISSED	--	--	1	--	3	1
REVERSED OR DENIED	12	11	15	7	11	8
OTHER	6	8	3	1	--	4
PERCENT REVERSED	20.3	16.4	25.9	18.9	23.4	18.2

TABLE 32

Exemption-Based Denials and Appeals - 1982

Agency	Exemption Based Denials	Appeals of Exemption Based Denials	Appeal Granted	Appeal Denied In Full	Appeal Denied In Part
C.I.A.	334	72	0	33	31
O.M.B.	36	11	2	3	6
Agric.	1,056	101	26	58	13
Commerce	268	73	15	19	23
Defense	11,531	433	42	254	137
Educ.	189	25	6	9	8
Energy	772	87	14	23	32
H.H.S.	885	156	16	93	47
H.U.D.	126	29	1	17	11
Interior	365	81	7	15	27
Justice	2,977	1,982	4	318	62
Labor	1,281	340	44	30	169
State	1,274	171	7	38	27
Transp.	1,805	78	10	30	36
Treas.	4,964	575	65	253	257
C.P.S.C.	207	28	4	12	*
E.P.A.	940	165	1	9	20
E.E.O.C.	1,215	93	3	38	46
F.C.C.	109	18	0	4	7
F.T.C.	414	72	8	32	32
G.S.A.	211	*	*	*	*
M.S.P.B.	96	16	1	12	3
N.A.S.A.	382	16	5	8	2
N.L.R.B.	718	83	9	74	*
N.R.C.	103	25	1	14	10
O.P.M.	172	43	9	16	18
S.E.C.	621	97	2	32	19
Postal Serv.	1,018	153	24	86	14
V.A.	1,382	27	6	9	13
Nat'l Arch.	*	*	*	*	*
TOTALS	35,451	5,050	332	1,539	1,069

TABLE 33

Exemption-Based Denials and Appeals - 1983

Agency	Exemption Based Denials	Appeals of Exemption Based Denials	Appeal Granted	Appeal Denied In Full	Appeal Denied In Part
C.I.A.	352	34	0	27	17
O.M.B.	31	6	0	2	4
Agric.	1,239	136	32	65	33
Commerce	240	62	9	15	19
Defense	4,791	567	55	382	130
Educ.	172	20	0	4	10
Energy	590	92	10	25	31
H.H.S.	1,384	150	13	102	32
H.U.D.	147	44	8	20	16
Interior	406	103	2	19	13
Justice	3,387	1,997	28	322	180
Labor	2,314	212	12	38	126
State	1,092	111	5	42	51
Transp.	1,664	106	12	56	31
Treas.	5,643	546	42	271	233
C.P.S.C.	737	56	0	22	0
E.P.A.	904	129	1	16	6
E.E.O.C.	2,156	117	4	47	66
F.C.C.	66	12	0	10	1
F.T.C.	425	61	7	18	23
G.S.A.	216	80	8	15	17
M.S.P.B.	19	7	0	5	2
N.A.S.A.	388	23	7	9	3
N.L.R.B.	504	83	4	74	0
N.R.C.	152	37	10	14	10
O.P.M.	398	50	9	25	13
S.E.C.	1,532	87	3	24	15
Postal Serv.	*	133	19	65	26
V.A.	*	37	5	15	17
Nat'l Arch.	8,470	*	*	*	*
TOTALS	33,207	5,098	305	1,749	1,125

TABLE 34

Exemption-Based Denials and Appeals - 1984

Agency	Exemption Based Denials	Appeals of Exemption Based Denials	Appeal Granted	Appeal Denied In Full	Appeal Denied In Part
C.I.A.	271	24	0	14	10
O.M.B.	31	8	0	6	2
Agric.	1,218	154	17	89	26
Commerce	258	52	8	8	15
Defense	5,439	830	77	612	141
Educ.	221	38	7	9	19
Energy	491	61	12	10	22
H.H.S.	1,508	172	22	112	38
H.U.D.	127	52	7	29	16
Interior	438	85	3	19	15
Justice	3,587	2,130	37	371	138
Labor	2,787	331	13	27	114
State	1,036	133	4	55	42
Transp.	1,640	112	21	54	27
Treas.	5,649	531	161	284	190
C.P.S.C.	509	35	0	22	*
E.P.A.	852	128	1	12	15
E.E.O.C.	2,334	152	7	43	77
F.C.C.	96	13	0	7	3
F.T.C.	381	48	4	12	26
G.S.A.	421	*	*	*	*
M.S.P.B.	105	17	0	7	10
N.A.S.A.	447	13	2	4	5
N.L.R.B.	501	74	3	65	6
N.R.C.	232	45	0	15	17
O.P.M.	70	54	8	21	14
S.E.C.	433	90	2	26	24
Postal Serv.	816	*	*	*	*
V.A.	746	38	5	17	10
Nat'l Arch.	45	*	*	*	*
TOTALS	32,689	5,420	431	1,950	1,028

TABLE 35

Nonexemption-Based Denials and Appeals - 1982

Agency	Nonexemption Based Denials	Appeals of Nonexemption Based Denials
C.I.A.	707	*
O.M.B.	31	*
Agric.	92	*
Commerce	237	*
Defense	7,318	70
Educ.	174	*
Energy	600	32
H.H.S.	*	2
H.U.D.	*	*
Interior	105	3
Justice	10,103	164
Labor	598	13
State	673	*
Transp.	587	1
Treas.	4,105	31
C.P.S.C.	*	*
E.P.A.	*	*
E.E.O.C.	*	*
F.C.C.	43	*
F.T.C.	281	6
G.S.A.	*	*
M.S.P.B.	38	1
N.A.S.A.	126	*
N.L.R.B.	159	*
N.R.C.	*	*
O.P.M.	14	6
S.E.C.	311	1
Postal Serv.	*	*
V.A.	580	4
Nat'l Arch.	*	*
TOTALS	26,882	334

TABLE 36

Nonexemption-Based Denials and Appeals - 1983

Agency	Nonexemption Based Denials	Appeals of Nonexemption Based Denials
C.I.A.	435	*
O.M.B.	18	*
Agric.	151	*
Commerce	229	*
Defense	7,085	*
Educ.	210	6
Energy	390	18
H.H.S.	328	3
H.U.D.	*	*
Interior	*	*
Justice	9,782	*
Labor	541	24
State	371	*
Transp.	699	4
Treas.	857	155
C.P.S.C.	*	*
E.P.A.	*	*
E.E.O.C.	211	*
F.C.C.	9	*
F.T.C.	294	3
G.S.A.	726	*
M.S.P.B.	51	4
N.A.S.A.	160	0
N.L.R.B.	256	*
N.R.C.	6	*
O.P.M.	0	0
S.E.C.	365	0
Postal Serv.	*	0
V.A.	648	0
Nat'l Arch.	936	0
TOTALS	24,758	355

TABLE 37

Nonexemption-Based Denials and Appeals - 1984

Agency	Nonexemption Based Denials	Appeals of Nonexemption Based Denials
C.I.A.	583	*
O.M.B.	18	*
Agric.	*	*
Commerce	193	*
Defense	8,954	93
Educ.	56	3
Energy	402	24
H.H.S.	281	6
H.U.D.	*	*
Interior	161	4
Justice	10,520	*
Labor	341	25
State	256	*
Transp.	675	2
Treas.	8,361	155
C.P.S.C.	*	*
E.P.A.	*	*
E.E.O.C.	226	*
F.C.C.	28	1
F.T.C.	403	*
G.S.A.	734	*
M.S.P.B.	39	3
N.A.S.A.	227	1
N.L.R.B.	166	*
N.R.C.	*	*
O.P.M.	*	*
S.E.C.	*	1
Postal Serv.	*	*
V.A.	506	2
Nat'l Arch.	1,137	*
TOTALS	34,267	320

TABLE 38

Exemption 1 Denials and Appeals - 1982

Agency	Initial Denials Based on Exemption 1	Appeal Denials Based on Exemption 1
C.I.A.	265	80
O.M.B.	1	0
Agric.	2	0
Commerce	20	0
Defense	547	85
Educ.	0	0
Energy	37	2
H.H.S.	0	0
H.U.D.	0	0
Interior	0	0
Justice	1,443	105
Labor	0	0
State	553	40
Transp.	3	0
Treas.	52	3
C.P.S.C.	0	0
E.P.A.	3	0
E.E.O.C.	0	0
F.C.C.	0	0
F.T.C.	0	0
G.S.A.	3	0
M.S.P.B.	3	1
N.A.S.A.	0	0
N.L.R.B.	0	0
N.R.C.	4	1
O.P.M.	0	0
S.E.C.	0	0
Postal Serv.	0	0
V.A.	0	1
Nat'l Arch.	0	1
TOTALS	2,936	317

TABLE 39

Exemption 1 Denials and Appeals - 1983

Agency	Initial Denials Based on Exemption 1	Appeal Denials Based on Exemption 1
C.I.A.	217	43
O.M.B.	2	0
Agric.	0	0
Commerce	16	0
Defense	814	86
Educ.	0	0
Energy	14	3
H.H.S.	0	0
H.U.D.	0	0
Interior	1	0
Justice	1,134	143
Labor	24	0
State	441	72
Transp.	4	0
Treas.	71	7
C.P.S.C.	0	0
E.P.A.	1	0
E.E.O.C.	0	0
F.C.C.	0	0
F.T.C.	0	0
G.S.A.	0	0
M.S.P.B.	0	0
N.A.S.A.	0	0
N.L.R.B.	2	0
N.R.C.	0	0
O.P.M.	9	1
S.E.C.	0	0
Postal Serv.	2	0
V.A.	1	0
Nat'l Arch.	48	0
TOTALS	2,801	355

TABLE 40

Exemption 1 Denials and Appeals - 1984

Agency	Initial Denials Based on Exemption 1	Appeal Denials Based on Exemption 1
C.I.A.	540	21
O.M.B.	2	0
Agric.	3	0
Commerce	17	0
Defense	1,257	194
Educ.	0	0
Energy	10	1
H.H.S.	0	0
H.U.D.	0	0
Interior	1	0
Justice	1,202	125
Labor	28	0
State	627	72
Transp.	8	1
Treas.	74	0
C.P.S.C.	0	0
E.P.A.	2	0
E.E.O.C.	0	0
F.C.C.	0	0
F.T.C.	0	0
G.S.A.	1	0
M.S.P.B.	0	0
N.A.S.A.	0	0
N.L.R.B.	0	0
N.R.C.	8	2
O.P.M.	0	0
S.E.C.	0	0
Postal Serv.	4	N/A
V.A.	0	0
Nat'l Arch.	34	0
TOTALS	3,818	416

NOTES

1. 5 U.S.C. § 552 (1982).

2. The nature and scope of the continuing controversy is well-reflected in the hearings on recent FOIA reform proposals. Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. (1981) [hereinafter cited as 1981 Senate Hearings]; Freedom of Information Reform Act: Hearings Before the Subcommittee on Information, Justice and Agriculture of the House Committee on Government Operations, 98th Cong., 2d Sess. (1984) [hereinafter cited as 1984 House Hearings].

3. The size and complexity of the body of law and procedure that has grown up around the Act has generated numerous efforts to summarize and clarify. Among the most prominent of these is a two-volume loose-leaf treatise, J. O'Reilly, Federal Information Disclosure: Procedures, Forms and the Law (1985) [hereinafter cited as Information Disclosure]; Department of Justice, "Freedom of Information Case List and Short Guide to the FOIA" (1985 ed.) [hereinafter cited as Justice Guide] and "Litigation Under the Freedom of Information Act and Privacy Act," Center for National Security Studies (10th ed. 1985) [hereinafter cited as FOIA Litigation].

4. The controversy surrounding the status of confidential commercial information under exemption 4 and the procedural rights of third-party submitters of such information is a particularly prominent example. See generally 1981 Senate Hearings and 1984 House Hearings. See also Recommendation 82-1, Administrative Conference of the United States, 1982 ACUS 1 (June 17, 1982).

5. The most detailed proposal was made by Robert L. Saloschin, former Director of the Office of Information Law and Policy, Department of Justice. "Proposal for an Independent Body." Remarks before the Federal Bar Association, 8th Annual Conference on Openness in Government, March 16, 1982. A comprehensive study of two state administrative schemes by Professor Robert G. Vaughn contains general suggestions for adapting those schemes to federal law. Vaughn, Administrative Alternatives and the Freedom of Information Act, 45 Ohio St. L.J. 185 (1984). The possible use of an administrative entity for FOIA case processing or policymaking is addressed in varying degrees of detail in the following: O'Reilly, Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy, 10 J. of Legis. 95 (1983); Koch & Rubin, A Proposal for A Comprehensive Restructuring of the Public Information System, 1979 Duke L.J. 1 (1979); Miller & Cox, On the Need for a National Commission on Documentary Access, 44 Geo. Wash. L. Rev. 213 (1976); Freedom of Information Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. 55 (1981) (Statement of Sen.

Sasser); Freedom of Information Act: Hearings Before the Subcomm. on Information, Justice, and Agriculture of the House Comm. on Govt. Operations, 98th Cong., 2d Sess. 1036 (Statement of the American Society of Access Professionals).

The use of an information "ombudsman" had been suggested in the legislative process leading the passage of FOIA. Freedom of Information: Hearings Before Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963). See O'Reilly, supra note 5, at 130 n.303. In the legislative process leading to the 1974 amendments, a commission to review agency denial was proposed. H.R. 4960, 93d Cong., 2d Sess. (1973). See Information Disclosure at 3-24. In the context of recent FOIA legislative reform proposals, a bill providing for centralized administrative supervision of agency compliance has been introduced. H.R. 3313, 99th Cong., 1st Sess. (1985).

6. Other similar concerns, of course, exist with respect to FOIA administration generally, for example the extent of agency resources available for and devoted to the processing of requests. These matters ultimately affect FOIA cases reaching the courts. The three concerns identified above also tend to subsume these once a court is involved.

7. The focal point of recent reform efforts has been S. 774, a bill which passed the Senate by a voice vote in 1984, 130 Cong. Rec. S1822 (daily ed. Feb. 27, 1984) but stalled in the House. The bill, entitled the "Freedom of Information Reform Act," primarily would have (1) altered the standards for fee charges and waivers to requesters, (2) extended the time limits for agency processing in "unusual circumstance" and amended the definition of that term in the Act by adding three new categories to the existing three, (3) added a provision establishing procedures that would permit submitters of commercial or financial information to present claims of confidentiality and (4) modified certain exemptions, particularly the law enforcement records exemptions.

8. 5 U.S.C. § 552a.

9. See Information Disclosure at 22-3 to 22-8 and FOIA Litigation 239-245.

10. 5 U.S.C. § 552(a)(6)(A)(i).

11. 5 U.S.C. § 552(a)(6)(A)(ii).

12. Id.

13. 5 U.S.C. § 552(a)(6)(B).

14. Id.

15. 5 U.S.C. § 552(a)(6)(C).

16. 5 U.S.C. § 552(a)(4)(B).

17. Id.

18. Id.

19. Id.

20. 5 U.S.C. § 552(a)(4)(E).

21. 5 U.S.C. § 552(a)(4)(B).

22. 5 U.S.C. § 552(a)(4)(C).

23. Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (1984) (repealing 5 U.S.C. § 552(a)(4)(D), a provision that required expedition for all FOIA cases "except as to cases the court considers of greater importance"). See infra notes 130-33 and accompanying text.

24. 5 U.S.C. § 552(a)(6)(C).

25. Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

26. Id. at 615.

27. Id. at 616.

28. 5 U.S.C. § 552(a)(4)(B).

29. 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

30. Id. at 825.

31. Id. at 826-28.

32. Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978).

33. See infra notes 55-57 and accompanying text. See also Justice Guide at 352-53.

34. See infra notes 138-39 and accompanying text. Discovery requests that seek in effect disclosure of the withheld information are obviously inconsistent with the purpose of the proceeding. See, e.g., Pollard v. FBI, 705 F.2d 1151 (9th Cir. 1983). Permissible discovery could include, for example, questions concerning the thoroughness of the agency

search for the requested records. Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974).

35. See, e.g., Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

36. See, e.g., Citizens for Environmental Quality, Inc. v. U.S. Dep't of Agriculture, Civil No. 83-3763, slip op. at 2 (D.D.C. May 24, 1984). See also Hydron Laboratories, Inc., 560 F. Supp. 718 (D.R.I. 1983); Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974).

37. See, e.g., Weisberg v. Department of Justice, 749 F.2d 864,868 (D.C. Cir. 1984).

38. See, e.g., Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979).

39. Lame v. Department of Justice, 767 F.2d 66, 69-70 (3d Cir. 1985).

40. Most of the important literature on the FOIA structure for case processing appeared either prior to 1974 and related to the need for procedural reform of the type represented by the 1974 amendments, or shortly after those amendments and assessed their effect. See, e.g., Katz, Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 Texas l. Rev. 1261 (1970); Nader, Freedom From Information: The Act and the Agencies, 5 Harr. C.R.-C.L. L. Rev. 1 (1970); Giannella, Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations, 23 Ad. L. Rev. 217 (1971); Clark, Holding the Government Accountable: The Amended Freedom of Information Act, 84 Yale L.J. 741 (1975); Relyea, The Freedom of Information Act a Decade Later, 39 Pub. Ad. Rev. 310 (1979).

41. See supra note 16 and accompanying text.

42. Between 1967 and 1972 a total of approximately 200 FOIA cases were filed. U.S. Government Information Policies: Hearings Before the House Comm. on Govt. Operations, 92d Cong., 2d Sess. 1177 (1972). The Administrative Office of the United States Courts began coding and collecting data on FOIA cases in 1977. That year alone, the number of filings recorded was 142. The next year the number had reached 532 and by the third year, 1979, the number reached 627, the same number filed in 1980. See also infra notes 43-44 and accompanying text.

43. The caseload and case processing statistics presented in this section were compiled primarily from data provided to the author by the Statistical Analysis and Reports Division of the Administrative Office of United States Courts. The remaining statistics were compiled from agency reports filed

with Congress. All compilations are set out in the tables that comprise the Appendix to this report. For convenience, most footnotes in this section refer to the applicable Appendix table as "Table ___, Appendix." The reporting periods for the court data are "statistical years," ending June 30, and for the agency data are calendar years.

44. Table 1, Appendix.

45. In statistical year 1984, of 1587 civil actions filed in the District of Columbia in which the United States was a party 190 were FOIA cases. Annual Report, Director, Administrative Office of the United States Courts, 256 (1984) and Table 3, Appendix.

46. Tables 1 and 3, Appendix.

47. See infra note 151 and accompanying text.

48. Table 2, Appendix.

49. Table 3, Appendix.

50. See infra notes 55-57 and accompanying text.

51. The Administrative Office of the United States Court calculates only the range of the time intervals in the middle 80% of the cases. There is no obvious reason to expect other than that the time intervals would follow a standard normal distribution; however, because the standard deviation for the intervals is not calculated, it is not possible to utilize that concept to model the distribution of the cases. See F. Herzon and M. Hooper, Introduction to Statistics for the Social Sciences 165 (1976).

52. But see id.

53. Table 16, Appendix.

54. For example, for statistical year 1985, of 269,848 civil cases terminated in the federal courts, 10,658 or 3.9% were terminated after court or jury trial, 33,404 or 12.4% reached pretrial and the remaining 225-786 or 83.7% were terminated before pretrial. Administrative Office of the United States Courts.

55. Table 15, Appendix.

56. For example, for statistical year 1985, of the 269,848 civil cases terminated in the federal courts, 127,919 or 47.4% were "dismissed, discontinued, settled or withdrawn." Administrative Office of the United States Courts.

57. For example, for statistical year 1985, of the 269,848 civil cases terminated in the federal courts 41,437 or 16.5% were terminated by "judgment on motion." Administrative Office of the United States Courts.

58. Table 17, Appendix.

59. See notes 57-58 and accompanying text.

60. Table 18, Appendix.

61. Table 31, Appendix.

62. See 5 U.S.C. § 552(d).

63. For example, the Department of Defense and the Department of Health and Human Services report individual requests for military or social security records, respectively, that routinely would have been granted prior to the Act.

64. 5 U.S.C. § 552(d)(1).

65. Id.

66. 5 U.S.C. § 552(d)(2).

67. This method excludes appeals from non-exemption based denials, i.e., denials based on procedural ground or such other factors as the absence of any record satisfying the request. While such denials range from roughly 25,000 to 35,000 per year, see Tables 35-37, Appendix, they are appealed at a much lower rate than exemption-based denials (14.6% versus 1.2%), see Tables 32-37, Appendix, and amount to roughly 300-350 per year or 6% of the total number of appeals. See id. Given the relatively small number of the cases, coupled with their widely varying but typically non-substantive content, they seem best put to one side for purposes of estimating the number of cases in which requester might reasonably be said to be dissatisfied with the final agency disposition. Some of these cases, however, do lead to court action. See, e.g., Brumley v. U.S. Dept. of Labor, 767 F.2d 444 (8th Cir. 1985).

68. Tables 32-34, Appendix.

69. Id.

70. See FOIA Litigation, supra note 4, at 18. See generally Information Disclosure, supra note 4, at 3-1 to 3-20.

71. See O'Reilly, supra note 5, at 100-109.

72. See id. at 102-104. See also Braeman, Overview of FOIA Administration in Government, 34 Ad. L. Rev. 111 (1982);

Saloschin, The Work of the Freedom of Information Committee of the Department of Justice, 28 Ad. L. Rev. 147 (1971).

73. Id.

74. Id.

75. 5 U.S.C. § 552(d).

76. Letter of Attorney General Bell to Heads of All Departments and Agencies, May 5, 1977, reprinted in 1981 Senate Hearings, supra note 2, at 912.

77. Memorandum from Attorney General William French Smith to the Heads of All Departments and Agencies, May 5, 1981, reprinted in FOIA Update, June 1981, at 3.

78. OIP's work in this regard is summarized in the Department's annual report to Congress under FOIA. See, e.g., 1984 Annual Report at 152-56.

79. Executive Order 12356, 47 Fed. Reg. 14874, 3 C.F.R. 166 (1982 Comp.), April 6, 1982.

80. For example, all or part of a previously-classified intra-agency memorandum may still be exempt under exemption 5 even though its disclosure would not cause the national security harm contemplated by the Executive Order.

81. Information Security Overnight Office, 1984 Annual Report to the President at 11-14.

82. Id. at 12-13.

83. Section 7(A), Executive Order 11652 (March 8, 1972) as amended by Executive Order 11714 (April 24, 1973).

84. Section 8, Executive Order 12356, supra note 79.

85. 5 U.S.C. § 1206(e)(1)(C).

86. Id.

87. 5 U.S.C. § 552(a)(4)(F).

88. Developments in the Law--Public Employment, 97 Harv. L. Rev. 1643-44 (1984):

> ... [Under 5 U.S.C. § 1206(e)] the OSC bears responsibility for investigating and prosecuting before the Board violations of the Hatch Act and arbitrary and capricious

> noncompliance with requests under the Freedom of Information Act.
>
> These seemingly broad powers are greatly circumscribed in practice, both by the Special Counsel's lack of authority to require either the Board or other agencies to do its bidding and by the political, budgetary, and staffing problems that have plagued the Office since its inception.

89. 5 U.S.C. § 552(a), The Privacy Act of 1974, Pub. L. No. 93-579 §6, 88 Stat. 1909 (1974).

90. See O'Reilly, supra note 5, at 98-100 and 109-10.

91. 44 U.S.C. §§ 3501-3520 (1982), Pub. L. No. 96-511, 94 Stat. 2812.

92. "Management of Federal Information Resources," OMB Circular No. A-130, 50 F.R. 52730 (December 24, 1985). See also O'Reilly, supra note 5, at 110-118, Relyea et al., "Management of Federal Resources: A General Critique of the March 1984 OMB Draft Circular, Congressional Research Service, Library of Congress (July 5, 1985).

93. Conn. Gen. Stat. § 1-21j(a) et seq. (West Supp. 1983). The description of the Connecticut Commission and the New York Committee in this section is summarized from Vaughn, supra note 5, at 192-209. The author also conducted telephone interviews with the Executive Directors of both these state agencies. See infra note 126.

94. Id. at 193-94.

95. Id. at 194-95.

96. Id. at 195.

97. Id. at 196.

98. Id. at 198.

99. Id. at 199.

100. Id.

101. Id.

102. Id.

103. Id. at 200.

104. Id. at 196-98.

105. N.Y. Pub. Off. Law § 89(1)(a) et seq. (McKinney's Supp. 1982-83). See Vaughn, supra note 5, at 200-09.

106. Id. at 200.

107. Id. at 201-02.

108. Id. at 202.

109. Id. at 203.

110. Id.

111. Id. at 204.

112. Id. at 207.

113. Id.

114. Id. at 208-09.

115. An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, S.C. 1980-81-82, c. 111. See Rankin, The New Access to Information and Privacy Act: A Critical Annotation, 15 Ottawa L. Rev. 1 (1983); Annual Report, Information Commissioner, 1983-84 at 5.

116. Id. at 6.

117. Id.

118. Id.

119. Id.

120. Id. at 7.

121. Id.

122. Id.

123. Id. at 6.

124. Vaughn, supra note 5, at 209-10.

125. The Canadian Access to Information Act became effective July 1, 1983.

126. The interviewees in the indicated categories were as follows:

First Category:

John O. Birch, Deputy Chief, Civil Division, D.C. United States Attorney's Office.

Steven Garfinkel, Director, Information Security Oversight Office, General Services Administration.

*Robert L. Gilliat, Assistant General Counsel, Office of the Secretary of Defense, Department of Defense.

Barbara L. Gordon, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice.

Richard L. Huff, Co-Director, Office of Information and Privacy, Office of Legal Policy, Department of Justice.

Daniel J. Metcalfe, Co-Director, Office of Information and Privacy, Office of Legal Policy, Department of Justice.

Russell M .Roberts, Director, Information and Privacy Division, Office of Public Affairs, Office of the Secretary, Department of Health and Human Services.

Leonard Schaitman, Assistant Director, Appellate Staff, Civil Division, Department of Justice.

Second Category:

Allan Adler, Legislative Counsel, American Civil Liberties Union.

Eric Glitzenstein, Attorney, Public Citizen Litigation Group.

Mark H. Lynch, Counsel, American Civil Liberties Union, Project on National Security.

*Alan B. Morrison, Director, Public Citizen Litigation Group.

David C. Vladeck, Attorney, Public Citizen Litigation Group.

Third Category:

Burt A. Braverman, Cole, Raywid & Braverman.

Ronald L. Plesser, Blum & Nash.

Robert L. Saloschin, Lerch, Early & Roseman.

*Thomas M. Susman, Ropes & Gray.

Fourth Category:

Robert M. Gellman, Counsel, Subcommittee on Information, Justice and Agriculture, House Committee on Government Operations.

Randall R. Rader, Counsel, Subcommittee on the Constitution, Senate Judiciary Committee.

Fifth Category:

Gerhard A. Gesell, United States District Judge.

Joyce Hens Green, United States District Judge.

*Carl McGowan, Senior United States Circuit Judge.

John H. Pratt, United States District Judge.

*Antonin Scalia, United States Circuit Judge.

Patricia M. Wald, United States Circuit Judge.

Two other persons interviewed do not fall within any of the indicated categories:

James A. McCafferty, Chief, Statistical Analysis and Reports Division, Administrative Office of the United States Courts.

Harold C. Relyea, American National Government Specialist, Library of Congress.

* Denotes persons affiliated with the Administrative Conference either as a government or a public member, a liason representative, or a senior fellow. With respect to one of these, Thomas M. Susman, the author discussed the study in person only in connection with the work of the Conference's Committee on Judicial Review and thereafter in a telephone interview.

Additionally, telephone interviews were conducted with the following:

Robert J. Freeman, Executive Director, State of New York Committee on Open Government.

Inger Hansen, Information Commissioner, Canada.

James T. O'Reilly, Senior Counsel, Proctor and Gamble, and Lecturer in Law, University of Cincinnati.

Mitchell W. Pearlman, Executive Director, State of Connecticut Freedom of Information Commission.

The first of the two forums referred to was a meeting of the Washington Ad Hoc Media Group, chaired by Richard M. Schmidt, counsel to the American Society of Newspaper Editors, and attended by the following 15 other media representatives: Steve Bookshester--NAB, Patrick Butler--Times Mirror, Patrick Carome--Washington Post, Diane Cohn--RTNDA, Elaine English--RCFP, Karla Grave--NCTA, Jim Grossberg--SPJ,SDX, Nancy Hendry--PBS, Claudia James--ANPA, Mark Johnson--CBS, Dick Kleeman--AAP, Alice Leff Lucan--Gannett Co. Inc., Molly Parker--NBC, Anita Small--Time, Inc., Ann Tonjes--NPR. The second was a panel session of the Annual Symposium of the American Society of Access Professionals attended by over 100 symposium registrants.

A number of additional telephone interviews were conducted to obtain certain statistical data. These interviews are cited in other parts of the report.

The identification of individuals and organizations in this note is not intended to indicate their agreement with the narrative summary of the interviews or with the conclusions or recommendations of this report.

127. Much of the concern that underlay the 1974 amendments to the Act was agency delay. See generally Freedom of Information: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm. and the Subcomms. on Administrative Practice and Procedure and Separations of Powers of the Senate Judiciary Comm., 93d Cong., 1st Sess. (1973) [hereinafter cited as 1973 Senate Hearings]. More recent consideration of possible FOIA reform continues to reflect concern over delay at the agency level. See, e.g., 1984 House Hearings at 128-131 (Statement of the Reporters Committee for Freedom of the Press).

128. In part these considerations are reflected in the provisions for extension of the 10 and 20 day time limits under the Act, supra notes 13-15 and accompanying text, as well as in the caselaw with respect to the constructive exhaustion

requirement; see Open American v. Watergate Special Prosecution Force, supra notes 24-27 and accompanying text.

129. The authority of the Special Counsel of the Merit Systems Protection Board to investigate "arbitrary and capricious" withholding of information under the Act represents one form such a structure might take; however, the narrow experience under that model limits its utility as a frame of reference for the broader problems of agency delay. See supra notes 85-88 and accompanying text. Moreover, because of its indirect association with the disciplinary provision of FOIA, 5 U.S.C. § 552(a)(4)(F), its connotations are sanction rather than incentive-oriented and thus not generally understood as a dispute resolution mechanism.

130. 5 U.S.C. § 552(a)(4)(D).

131. Pub. L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

132. Id.

133. H.R. Rep. No. 98-985, 98th Cong., 2d Sess. at 5-6:

> The Committee recognizes in Section 2(a) the special nature of Freedom of Information Act cases. This section recognizes the need to expedite hearings upon the showing of "good cause" and defines good cause as including a right under Section 552 of Title 5, the Freedom of Information Act (FOIA).
>
> The Freedom of Information Act is a major tool through which the public and the press obtain information about their government. Prompt review of decisions denying access to government information is critical to FOIA users and to the purposes of the Act. Without such prompt review, government officials can delay access to public records, and extended delays in court can encourage unjustified refusals to disclose information. Frequently the value of disclosed information is transitory. If this information is not released in a timely manner, it may be of no value at all. Further most FOIA cases do not involve extended discovery or testimony and therefore do not burden court dockets for extensive periods of time. Expedited action by the courts in these cases can reduce the opportunities to hamper reporting of governmental activities, and it

> is the intent of the Committee that the "good cause" provision be liberally construed by the courts in granting requests for expedited consideration under the Freedom of Information Act.

134. See Council on the Role of the Courts, The Role of Courts in American Society 45-67 (Lieberman, J. ed. 1984) [hereinafter cited as Role of Courts].

135. In cases in which the final agency disposition satisfies the requester, the matter of actual or potential delay in a court proceeding is not an issue. In cases in which the requester is not satisfied and chooses to proceed in court, any additional delay represented by the court proceeding becomes part of the total time cost in the access process. Where time is critical, the prospect of additional delay may simply deter the requester from seeking court review. If the requester is not deterred, the independence of the forum is to some extent an offsetting consideration in accepting court delay.

136. See Report to the Chairman, Subcommittee on the Constitution, Senate Committee on the Judiciary, "Guidance Needed If Better Freedom of Information Act Cost Reports Are Desired," General Accounting Offices GGD-83-71 (June 22, 1983) [hereinafter cited as GAO Cost Report].

137. Freedom Information Oversight: Hearings before House Comm. on Government Operations, 97th Cong., 1st Sess. 202 (1981); O'Reilly, supra note 5, at 103 n.61.

138. The point of comparison is ordinarily large scale federal court litigation, but there is, of course, a wide range of cost in the spectrum of federal civil cases. Role of Courts at 60-61.

139. While the costs and benefits are not easily quantified even for the sophisticated requester, it seems clear that considerable value is attached to moving the case from the mass of cases receiving "ordinary" agency treatment to the few that are subject to the rigors of disinterested, external decisionmaking.

140. Because this group of users of the Act is extremely diverse and by definition not specifically represented by identifiable individuals or organizations, it is difficult to assess the actual experience of such requesters in seeking to have access claims resolved after final agency disposition. Many of the interviewees in this study expressed concern for the barrier federal court litigation may represent for these users. The text reflects these concerns.

141. The language of the Vaughn opinion itself suggests that the purpose of the index is not merely to aid the court in decisionmaking, but also to bring focus to and impose some administrative burden in the assertion of exemption claims:

> The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution--for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.

484 F.2d at 828.

142. See GAO Cost Report at 12-15.

143. Apart from the statutory requirement that the plaintiff "substantially" prevail to be eligible for attorney's fees, the court must consider in its discretion whether to award fees in light of four factors based in the legislative history of the fee award provision: "(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law." Fenster v. Brown, 617 F.2d 740, 742 (D.C. Cir. 1979). Finally, the calculation of the appropriate fee involves a complex of factors applied to FOIA and other (e.g., Title VII) fee awards claims:

> The initial task in determining an appropriate fee award under Copeland III is to establish the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. 641 F.2d at 891. A reasonable hourly rate was defined in Copeland III as that prevailing in the community for similar work. Id. at 892. Once established, the lodestar may be

> adjusted to reflect various other factors. The Court noted that a premium should generally be awarded if counsel would have obtained no fee in the event the suit was unsuccessful or if the fee award is made long after the services were rendered. Id. at 892-93. In addition, it indicated that the lodestar figure may be either increased or reduced to recognize legal representation of unusually superior or inferior quality. Id. at 893-94.

National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1323 (D.C. Cir. 1982), reh'g en banc denied, Nos. 81-1364, 82-1424 (D.C. Cir. Aug. 26, 1982). See also FOIA Litigation at 175-86; Justice Guide at 356-60.

144. Many factors may call into question whether this class of cases can be considered representative of FOIA litigation. The class includes only those cases in which the plaintiff prevailed (or in settled cases would likely have prevailed) and cases that have the "public" quality suggested by the discretionary standards for making a fee award. See supra note 143. On the other hand, this class of cases tends to be the one generally focused upon in assessments of how well the FOIA is working. In any event no other meaningful data is readily available. See supra note 136 and accompanying text.

145. 1980-1984 Department of Justice Annual Freedom of Information Act Reports to Congress.

146. See infra notes 203-05 and accompanying text. (The calculation is based on the Administrative Office of the Courts' estimate of the annual recurring costs of a federal district judgeship--$413,000--and a federal circuit judgeship--$421,000--times the district and circuit staffing requirement based on the weighted caseload factor. Cost to the Judiciary, Administrative Office of the United States Courts, Budget Branch, March 8, 1985.)

147. The role of the courts in this development is seen as having essentially three components (1) defining the scope of the exemptions, (2) establishing procedural requirements, and (3) providing a neutral forum for access disputes.

148. For example, the 1974 amendment to the seventh exemption reflected dissatisfaction with a series of D.C. Circuit decisions construing that exemption. E.g., Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974). See generally Information Disclosure at 3-21 to 3-31.

149. For example, the 1974 amendment requirement that "any reasonably segregable" non-exempt portion of an otherwise exempt record be released had been developed in the courts. E.g., Bristol Meyers Co. v. FTC, 424 F.2d 939, 939 (D.C. Cir. 1970); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

150. There are, however, limitations on the role courts can play in the FOIA process. See, e.g., Vaughn, supra note 5, at 192 n.43:

> The judicial role is necessarily limited for several reasons. Among these are: (1) the concerns created by the separation of powers doctrine that the courts not intrude improperly into the operations of a coordinate branch of government; (2) the role of courts in Freedom of Information Act litigation limiting the courts primarily to ordering the release of documents; (3) the episodic case by case nature of litigation reducing the courts' ability to provide effective administrative oversight; (4)the expenses and costs of litigation restricting the information brought to the courts and the opportunity to act; and (5) the lack of familiarity with the details of a range of agency practices and policies.

151. See supra note 46 and accompanying text.

152. The mature state of FOIA caselaw reflects judicial processing of roughly 4000 cases over a period of nearly twenty years.

153. These differences are reflected throughout the hearings or proposed FOIA amendments considered by Congress over the last several years. See supra note 2. For an interesting contrast in views outside the legislative process; compare Scalia, The Freedom of Information Act Has No Clothes, Regulation, 14-19 March/April 1982, with Wald, The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values, 33 Emory L. J. 649 (1984).

154. 5 U.S.C. § 552(a)(4)(B).

155. The announced shift in Department of Justice policy with respect to the defense of agencies in FOIA litigation from the Carter Administration to the Reagan Administration, see supra notes 76-77 and accompanying text, was a highly visible development seen to mark different access philosophies.

156. The proposed FOIA Reform Act has spawned charges and responses that speak in terms of "dismantling" the Act as opposed to performing needed "corrective surgery." The metaphors are even refined to a choice between using "a screwdriver rather than a crowbar," 1981 Senate Hearing at 155 (remarks of Senator Hatch) as opposed to "a microscope and a scalpel," id. at 165 (statement of Judge Renfrew).

157. 5 U.S.C. § 552(a)(3).

158. See, e.g., supra note 143 (standards for awarding attorney's fees).

159. See, e.g., S. 774, 98th Cong., 2d Sess. § 1 (amending 5 U.S.C. § 552(a)(4)(A) to provide relief from fees otherwise imposed by the bill "where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a non-profit group that intends to make the information available to the general public").

160. An access dispute resolution mechanism perceived as having less stature than a federal district court would, from some perspectives, be suitable for "small claims," but not others. The distinction, however, appears to rest at that level of generality.

161. See Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 118-26 (1976). See also S. Goldberg, E. Green, & F. Sander, Dispute Resolution 10-13 (1985) [hereinafter cited as Dispute Resolution].

162. This distinction is, of course, subject to the statutory requirement that "reasonably segregable" non-exempt portions of a record be made available. 5 U.S.C. § 552(b). The determination here likewise is between segregability and non-segregability.

163. See Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 393-402 (1979) (illustrating the unsuitability of the polycentric dispute for resolution by adjudication).

164. This essentially describes the process of adjudications of FOIA claims in the de novo judicial proceeding. Apart from the limitations addressed by the Vaughn index, the process when fully invoked is rather straightforward adjudication. See id. at 364.

165. See supra notes 58-59 and accompanying text.

166. When these factors exist in combination in particular cases they may even better explain the intensity with which some claims are pursued.

167. While in many cases there is a relationship of sorts between the agency and the requester, e.g., that of "regulator" and "regulatee," it is not of the kind that would require mediative rather than imposed resolution of the FOIA claim in the interest of the relationship.

168. The combination of these factors tends to indicate the need for a strictly adjudicative resolution of many FOIA cases. See Dispute Resolution at 10-11.

169. In some cases, of course, governmentally generated or procured information or third-party submitted information has significant monetary value. Even in these cases, however, the value is not easily calculated.

170. As long as a party significantly values obtaining or protecting the information, its intrinsic value is irrelevant. Thus, the normal shorthand for identifying "amount" in controversy must yield to an essentially unquantifiable perception.

171. The two latter factors affect all cases. Unless the post-agency process lends itself to the promotion of prompt resolution of the dispute the delay seems intractable.

172. Cost-effectiveness as a goal is, of course, unobjectionable. The difficulty lies in the evaluative process. The limitations of the available data with respect to the cost-effectiveness of the existing access structure, and many-fold with respect to untested alternatives, seriously burden the evaluation.

173. Dispute Resolution at 8-9.

174. For example court-annexed arbitration. See E. Lind and J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Court, Federal Judicial Center (rev. ed. 1983).

175. See supra notes 162-168 and accompanying text.

176. To indicate that these processes could be available for non-mandatory use should not be understood as deprecating their potential value. The conclusion is based not only on a concern for avoiding costly layering in the process, but also on a recognition of the importance of consent to the effective use of these processes from both the requester and agency perspectives. See also infra note 186.

177. As the use of arbitration expanded beyond the field of labor relation into various commercial fields the rationale of and form for the proceeding has changed and there remains some question as to transferability of the traditional labor model. See, e.g., Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979).

178. Conceptually "appeal" of an adjudication suggests broader reviewability than is available from a traditional arbitration. See United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

179. The term "adjudication" is used here to describe both the process in its fully invoked form and its less formal adjuncts. The combined process has been described as "litigotiation" or the "process of disputing in the vicinity of official tribunals." See Galanter, Worlds of Deals: Using Negotiation to Teach About Legal Process, 34 J. of Legal Educ. 268 (1984). Clearly this occurs in the FOIA post-agency process. See supra notes 53-57 and accompanying text.

180. Again it should be noted that non-adjudicative alternatives may be made available in addition to the formal, binding process. See infra note 186 and accompanying text.

181. See, e.g., Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 237-39 (The Pound Conference 1976). See also R. Posner, The Federal Courts: Crisis and Reform (1985). Greater use has also been made of decisionmakers adjunct to Article III bodies such as United States Magistrates. See generally Hearing: Judicial Conference of the United States before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess. (1983). As these adjunct decisionmakers themselves become burdened with new assignments their ability to relieve the burden on Article III courts is diminished. Moreover, despite their Article III association, U.S. Magistrates continue to labor under a cloud of second-class status because of their lack of Article III protections. See Note, Federal Magistrates and the Principles of Article III, 97 Harv. L. Rev. 1947 (1984).

182. Role of Courts at 102-105.

183. The significance of these considerations for particular classes of requesters or disputes would vary along the lines of the taxonomy developed, but the focus here is on the overall process.

184. See Information Disclosure at 3-1 to 3-31.

185. See generally O'Reilly, supra note 5. In the privacy area centralized administration has been recommended. Privacy

Protection Study Commission, Personal Privacy in an Information Society (1977). See also H.R. 1721, 99th Cong., 1st Sess. (1985) ("A bill to establish a Data Protection Board, and for other purposes.")

186. Role of Courts at 97. The conciliation function incorporates into the overall Authority structure a limited and modified form of the ombudsman function that has long been considered a desirable dispute resolution mechanism in certain settings. See generally W. Gellhorn, Ombudsman and Others: Citizen's Protectors in Nine Countries (1966); The Ombudsman (D. Rowatt ed. 1965); Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845 (1975). As indicated earlier, see supra notes 105-123 and accompanying text, variations on the ombudsman theme have been used in access dispute resolution. See also Vaughn, supra note 5, at 212-214; and note 131 and accompanying text.

187. See supra note 129 and accompanying text.

188. See infra note 211 and accompanying text.

189. Buckley v. Valeo, 424 U.S. 1, 118-143 (1976).

190. 44 U.S.C. §§ 2102-03.

191. 44 U.S.C. §§ 2104-11.

192. Rather than directly limiting removal to "cause," the statute provides:

> The Archivist may be removed from office by the President. The President shall communicate the reason for any such removal to each House of the Congress.

Id. § 2103(b).

193. The time would be a matter of hours or days, rather than months or even weeks, except in extraordinary cases.

194. See supra notes 53-54 and accompanying text.

195. See supra notes 55-57 and accompanying text.

196. See supra notes 93-104 and accompanying text.

197. The agency appeals process ordinarily involves review of the withheld records rather than merely the initial decision-maker's characterization of the records and the reasons for withholding.

198. Apart from the assumption, some evidence exists in the study data that post-agency FOIA case processing can be handled more rapidly by more experienced decisionmakers. The overall median time intervals to termination in the District Court for the District of Columbia were somewhat faster than in all district courts combined. See supra note 49 and accompanying text (6 to 8 months in the District compared to 7 to 10 months for all courts over the six year period).

199. See supra notes 55-57 and accompanying text.

200. Telephone interviews with Richard L. Huff, Department of Justice; Col. Charles Talbott, Department of Defense, and Ross Cirrincione and Douglas Guerdat, Department of Health and Human Services.

201. Id.

202. See supra note 44 and accompanying text.

203. See The Weighted Caseload Studies: 1946-80, Annual Report of the Director, Administrative Office of the United States Courts, 290-97, Table X-Z (1980).

204. Id.

205. Report of the Judicial Conference Committee on Court Administration to the Chief Justice, Chairman, and Members of the Judicial Conference of the United States 4 (July 1980). For circuit judges the number is 450 filings. Id. at 1.

206. This time would include not only actual travel time, but also various time costs associated with case processing away from a central facility.

207. See supra notes 46-47 and accompanying text.

208. Cases "dismissed, settled or withdrawn" account for 52% of the total.

209. The workload relief provided by the two support positions is difficult to estimate. If each provided only a 15% relief the total reduction would more be than 500 hours per ALJ.

210. See supra note 62-69 and accompanying text.

211. The availability of conciliation may have the effect of reducing the active adjudication docket below 500 cases per year inasmuch as that figure is the product of a structure with no informal post-agency dispute resolution mechanism.

212. This estimate would cover either a caseload ranging from 500 to 1000 or a caseload of 500 with 100% underestimation in required processing time. Above these ranges, additional staffing would likely be required.

213. Adding or even removing a conciliator should pose fewer administrative problems than adjusting the number of ALJs.

214. These requirements are not estimated and would depend upon the particular functions assigned.

215. See supra notes 176 and 188 and accompanying text.

216. See supra notes 127-146 and accompanying text.

217. See supra note 186 and accompanying text.

218. Only in the last several years has the term "ombudsman" been formally used by a federal agency to describe a complaint-handling official. See infra notes 276-306 and accompanying text. The most prominent of these is the Taxpayer Ombudsman in the IRS.

219. See supra notes 71-68 and accompanying text.

220. The use of an central information ombudsman was considered, but dropped, in the legislative process leading to the 1966 act. Freedom of Information: Hearings Before Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963). See O'Reilly, supra note 5, at 130 n.303.

221. The interpretative manual issued by the Department upon the passage of the APA, Attorney General's Manual on the Administrative Procedure Act (1947), became the model for a similar interpretative document issued upon the passage of the "freedom of information" amendments to the APA in 1966. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967).

222. The Department's general authority is expressed in 28 U.S.C. § 516 (1982):

> Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice under the direction of the Attorney General.

A few agencies are statutorily granted authority to conduct their own litigation, including freedom of information actions. See, e.g., 42 U.S.C. § 2000e-4(b) (1982).

223. While the most dramatic increase in litigation occurred after the 1974 amendment, by the early 1970s the number of FOIA cases filed had reached 200. See supra note 42, and accompanying text.

224. See Sellers, Public Enforcement of the Freedom of Information Act, 2 Yale L. & Pol. Rev. 78, 90-91 (1983); O'Reilly, Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy, 10 J. of Legis. 95, 102-103 (1983).

225. Memorandum to General Counsel of All Federal Departments and Agencies Re Coordination of Certain Administrative Matters Under the Freedom Act (Dec. 8, 1969).

226. 38 Fed. Reg. 19123 (July 18, 1973).

227. See Sellers, supra note 224, at 92-93.

228. United States Government Information Policies and Practices--Administration and Operation of the Freedom of Information Act: Hearings Before the Subcomm. on Government Information of the House Comm. on Government Operations, 92 Cong., 2d Sess., Pt. 4 at 1182 [hereinafter cited as 1972 House Hearings].

229. See Sellers, supra note 224, at 93.

230. Id. at 93 n.73.

231. See 1972 House Hearings at 29-33; see also Staff of the House of Gov't Operations Comm., 92d Cong., 2d Sess., Administration of the Freedom of Information Act: An Evaluation of Gov't Information Programs Under the Act, 1967-72, at 69 (1972).

232. 5 U.S.C. § 552(d).

233. See supra note 42.

234. 41 Fed. Reg. 10222 (March 10, 1976).

235. See Sellers, supra note 224, at 94 n.77.

236. Letter of Attorney General Bell to Heads of Departments and Agencies, May 5, 1977, reprinted in 1981 Senate Hearings, supra note 2, at 912.

237. Id.

238. Id.

239. See Sellers, supra note 224, at 96.

240. The Civil Division's opportunity for compliance-promoting activity extends beyond an initial decision to defend throughout all phases of the defense process as a case develops.

241. Dept. of Justice Order 803-78, "Establishment of the Office of Information Law and Policy" (September 27, 1978), codified as 28 C.F.R. §§ 0.28-29 (1979).

242. See generally Sellers, supra note 224, at 90-99.

243. Memorandum from Attorney General William French Smith to the Heads of All Departments and Agenices, May 5, 1981, reprinted in FOIA Update, June 1981, at 3.

244. Dept. of Justice Order No. 973-82, 47 Fed. Reg. 10809 (March 4, 1982), codified as 28 C.F.R. 0.28 (1983).

245. See infra note 251 and accompanying text.

246. While the function has over the years been assumed by various components of the Department, it has coexisted with other FOIA-related activities carried out in those components.

247. Interview with Daniel J. Metcalfe and Richard L. Huff, Co-Directors, Office of Information and Privacy, Dept. of Justice, July 21, 1986 [hereinafter cited as Metcalfe-Huff Interview]; telephone interview with Daniel J. Metcalfe, September 19, 1986.

248. Id.

249. Id.

250. 28 C.F.R. 0.2_ (1986).

251. See, e.g., 1985 Attorney General's Annual Freedom of Information Report at 187.

252. See 1978-1985 Attorney General's Annual Freedom of Information Report.

253. This description of the citizen complaint-handling function has appeared in the Attorney General's annual reports since 1979. See, e.g., 1985 Annual Report at 190.

254. See infra text accompanying note 255.

255. Compiled from 1979-1985 Attorney General's Annual Freedom of Information Reports.

256. See, e.g., Information Disclosure at 3-11 to 3-16.

257. The most formal recognition of this capacity is the statutory reporting requirement for efforts undertaken to "encourage agency compliance," 5 U.S.C. § 552(d), and its legislative history, Staff of Senate Committee on the Judiciary and House Comm. on Govt. Operations, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Sourcebook: Legislative History, Texts, and Other Documents (Jt. Comm. Print 1975).

258. *See*, *e.g.*, *supra* note 155 and accompanying text.

259. W. Gellhorn, *Ombudsman and Others: Citizens' Protectors in Nine Countries* (1966); W. Gellhorn, *When Americans Complain: Governmental Grievance Procedures* (1966).

260. *See*, *e.g.*, S. 1195, 90th Cong., 1st Sess. (March 7, 1967) (a bill to establish an administrative ombudsman with jurisdiction over the social Security Administration, the Veterans Administration, the Internal Revenue Service and the Bureau of Prisons).

261. *See* Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845, 847 (1975).

262. *The Ombudsman: Citizen's Defender* (D. Rowat ed. 1968).

263. *See* Verkuil, *supra* note 261, at 846-47.

264. The mechanisms for ensuring independence, for example, may vary depending upon the characteristics of the system of administration in which the ombudsman operates.

265. Rowat, *supra* note 262, at xxiv.

266. *See generally* Caiden, MacDermot, & Sandler, "The Institution of Ombudsman," 11-15, Hill, "The Self-Perception of Ombudsmen," 43-44, Mills, "The Ombudsman in the American Constitutional, Legal and Political Structure," 209-212, in *International Handbook of the Ombudsman* (Caiden ed. 1983).

267. See, for example, an observation in Danet, Toward a Method to Evaluate the Ombudsman Role, 10 Admin. & Soc. 335, 338 (1978) that a recent bibliography on ombudsmen and quasi-ombudsmen contains nearly five hundred entries "but only a handful address the question of how well the ombudsman idea works in practice."

268. *Id.* *But see*, *e.g.*, Miewald and Comer, Complaining as Participation: The Case of the Ombudsman, 17 Admin. & Soc. 481 (1986).

269. See, for example, the three current federal uses of ombudsmen, *infra* notes 278-301 and accompanying text.

270. W. Gellhorn, When Americans Complain, supra note 259, at 224-25.

271. Id. at 225-26.

272. Caiden, MacDermot, and Sandler, "The Institution of Ombudsman," 9-19, in International Handbook of the Ombudsman (Caiden ed. 1983) [hereinafter cited as Institution of Ombudsman].

273. See supra note 69 and accompanying text.

274. See supra notes 186-188 and accompanying text.

275. See infra notes 307-28 and accompanying text.

276. Institution of Ombudsman at 9-12.

277. One of the most far-reaching mechanisms for citizen complaint handling is the referral of constituent complaints by members of Congress to the complained-against agency. The referral normally generates an agency response that is in turn forwarded to citizen. Most agencies have well-established procedures for handling such matters, but the effect of this mechanism on administration generally would be extremely difficult to evaluate. A bill to centralize the "casework" process by the establishment of a congressional office of "Administrative Counsel" was introduced in 1963 by Congressman Reuss. H.R. 7593, 88th Cong., 1st Sess., July 16, 1963. This bill was precursor of some broader, and more explicit "ombudsman" proposal made after the appearance of the Gellhorn studies. See generally Rowat, Citizen's Defenders, supra note 262, at 194-200 and 235-63.

278. See infra notes 279-306 and accompanying text.

279. "Problem Resolution Program Taxpayer Ombudsman," Internal Revenue Service (1986) [hereinafter cited as Problem Resolution Program]. See also Problem Resolution Program Handbook, Internal Revenue Manual (1986) [hereinafter cited as PRP Handbook].

280. Id.

281. Id.

282. Id. See PRP Handbook at 1279-37.

283. Id.

284. Id.

285. Id.

286. Id.

287. Id.

288. Telephone Interview with Linda Martin, Director, Problem Resolution Staff, August 27, 1986.

289. Id.

290. Id.

291. Id.

292. Pub. L. No. 96-70, 93 Stat. 455 (1979), codified as 22 U.S.C. § 3601 et seq.

293. 22 U.S.C. § 3623(a).

294. 22 U.S.C. § 3623(b).

295. 22 U.S.C. § 3623(c).

296. 1985 Annual Report of the Panama Canal Commission 25 (1985).

297. Pub. L. No. 98-616, Title I, § 103(a), 98 Stat. 3225, codified as 42 U.S.C. § 6917(a).

298. 42 U.S.C. § 6917(b).

299. 42 U.S.C. § 6917(c).

300. Telephone Interview with Robert Knox, RCRA Ombudsman, August 22, 1986.

301. 42 U.S.C. § 6917(d).

302. See 42 U.S.C. § 3024(a).

303. 42 U.S.C. § 3027(a)(12)(A)(i-iv).

304. H.R. 5050, 99th Cong., 2d Sess. (1986); Cong. Rec., July 22, 1986, H4692-96.

305. Id. § 102(F)(4)(A-E).

306. Id. at § 102(f)(5). See also H.Rep. No. 99-680, 99th Cong., 2d Sess. 14 (1986).

307. See supra notes 105-114 and accompanying text. See also Loeb, "Open Government in New York," Freedom of Information Center, School of Journalism, University of Missouri-Columbia (Rep. No. 512, June 1985).

308. _See_ _supra_ notes 115-23 and accompanying text.

309. S.C. 1980-81-82, c. 111 § 30.

310. _Id_.

311. The description of the structure and operation of the Office of the Information Commissioner is taken from: (1) 1983-1985 Annual Reports of the Information Commissioner [hereinafter cited as "IC Annual Report"]; (2) Brief to the House of Commons Standing Committee on Justice and Legal Affairs submitted by the Information Commissioner in connection with three year review required under section 75 of the Access to Information Act dated May 7, 1986 [hereinafter cited as IC Brief]; and (3) Interview with Inger Hansen, Q.C. Information Commissioner, July 23, 1986 [hereinafter cited as IC Interview].

312. IC Brief § 5.1 et seq.

313. IC Brief § 2.5. _See_ _also_ IC Annual Report (1983-1985).

314. _Id_.

315. _Id_.

316. IC Annual Report (1983-1985).

317. _Id_.

318. IC Brief § 10.2. Through May 1, 1986 only 47 were brought by third parties to prevent disclosure of their information. Of the 17 non-reverse cases, 6 were commenced by the Information Commissioner on behalf of complainants and 11 were commenced by complainants in cases where investigations by the Information Commissioner had determined that positions taken by the government were correct. _Id_.

319. _See_ _supra_ note 317 and accompanying text.

320. IC Brief § 2.1.

321. _Id_. § 2.2.4.

322. _Id_. § 2.4.

323. IC Interview.

324. _Id_.

325. Access to Information Act § 42. _See_ _also_ IC Brief § 10.1-10.3.

326. IC Brief § 2.2.4.

327. E.g., Rubin, Suggested Changes to Canada's 1982 Access to Information Act, 72-78 (1986).

328. IC Brief § 1.5.

329. Freedom of Information Act 1982 (Cth).

330. Id. Part VI.

331. Id.

332. The description of the authority and activity of the Commonwealth Ombudsman in the freedom of information field is taken from: (1) the 1983-1985 Annual Reports of the Commonwealth Ombudsman [hereinafter cited as "CO Annual Report"]; (2) the Submission by the Commonwealth Ombudsman's Office to the Senate Standing Committee on Constitutional and Legal Affairs Re Freedom of Information Legislation (1986) [hereinafter cited as "CO Submission"]; and (3) telephone interview with Lindsay Shaw, Senior Assistant Ombudsman, October 8, 1986 [hereinafter cited as CO Interview].

333. Ombudsman Act 1976 (Cth).

334. 1983-84 CO Annual Report at 24.

335. CO Interview. The other major area of responsibility for this Deputy Ombudsman arises from the Complaints (Australian Federal Police) Act of 1981.

336. Id. See also CO Submission (statistical Data Appendix) at 6.

337. CO Interview.

338. Id. 1983-1985 Annual Report; CO Submission (Statistical Data Appendix) at 1.

339. Id. CO Submission at § 2.1.

340. CO Submission at § 1.4.

341. CO Interview.

342. 1983-84 CO Annual Report at 26; 1984-85 Annual Report at 170.

343. CO Submission (Statistical Data Appendix) at 1-2.

344. CO Submission at §§ 2.6 and 2.10.

345. CO Submission at §§ 2.13 at 2.14.

346. Id. at § 2.15.

347. See supra notes 127-152 and accompanying text.

348. The third goal is less an independent goal than a recognition of the opportunity that an external complaint processing entity has for identifying systemic problems.

349. See supra notes 24-27 and 127-29 and accompanying text.

350. It is difficult to formulate a general standard that would distinguish ordinary from extraordinary issues of delay. The length of the delay or the time-value of the information alone would not normally be dispositive. Perhaps the most that can be said is that specific allegations in a complaint that provide a reasonable basis for believing that an agency is failing to meet the "due diligence" standard in processing a request should be subject to investigation.

351. In the case of complaints determined to be outside the jurisdiction of the ombudsman, the nature of the complaint and the reason for the determination should be maintained.

352. Both the Canadian and Australian Ombudsman handle such questions. The Department of Justice Office of Information and Privacy also responds to such inquiries. While assistance of this type is also available from other agencies and non-governmental sources, an information ombudsman office would naturally attract these inquiries and should undertake to provide this service so long as its volume does not seriously interfere with its primary complaint processing function.

353. The primary purpose of the ombudman's report would be to provide a statement of views that could assist the parties in the resolution of their dispute. In cases that are not resolved informally, the practical effect of the report may be to influence a position taken by one party or the other in litigation. But any judicial deference to the report would misconceive the nature of ombudsman function and likely undermine the ability of an ombudsman to operate in a conciliative capacity. Ideally, the report would be excluded altogether from the judicial process.

354. As noted earlier, a complaint to the Canadian Information Commissioner is a prerequisite to suit in Federal Court. This provision was largely premised on the view that a mandatory informal process would hold the volume of access litigation in Canada below the U.S. levels. Given the limited usage of the Canadian Act thus far and the absence of a Canadian base volume for comparison, it is difficult to assess how well

the requirement serves this objective. Whatever its benefits, the cost of the requirement is to restrict access to the courts and then impose the informal process on some cases that have little if any promise of non-adjudicative resolution. These considerations, as well as workload constraints, and the very concept of the ombudsman militate against allowing availability of the ombudsman to limit the opportunity to adjudicate the dispute in the U.S.

While both the Canadian and Australian Ombudsmen may represent complainants in judicial proceedings, this authority is again inconsistent with the traditional concept of the ombudsman and is not widely used by either. It would be particularly inapt in the U.S.

355. This would be the preferred means for resolving a complaint. It would obviate the need for the ombudsman's making a report (other than a pro forma one acknowledging that the complaint had been resolved). While the ombudsman must have the authority to issue a critical report, the less frequent the resort is made to that authority the more respect a report is likely to command.

356. Even if it were possible to catalog the various methods theoretically available to the ombudsman, some would require the consent and cooperation of both the requester and the agency. The willingness of the parties to proceed in particular ways may set the practical boundaries for the ombudsman's methods.

357. Apart from broad questions of access policy, the application of certain provisions of the Act, *e.g.*, exemption 6, requires a weighing of competing interests. *See* Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

358. Cramton, A Federal Ombudsman, 1972 Duke L.J. 1, 6 (1972).

359. Each component of this approach--explicit statutory authority, presidential or congressional appointment, and structural separation--contributes to independence and stature. It is thus the combination of these elements rather than any one of them that supports the characterization of this approach as representing "one extreme" in positioning the ombudsman.

360. The characterization of this approach as representing the "other extreme" depends upon the absence of all three rather than the absence of any one of the components noted above. *See supra* note 359 and accompanying text.

361. While the Internal Revenue Service is concededly a complex bureaucracy with semi-autonomous regional and district components, the ultimate hierarchical structure of the Service

provides a position for the Taxpayer Ombudsman (a member of the Commissioner's immediate staff) that at least implicitly cuts across other organizational lines. Arguably, only at the presidential level would the FOIA Ombudsman have similar stature. Assuming the ombudsman would hold a lesser organizational position, other institutional indications of administration support become more important.

362. The considerations of efficiency are similar to, but perhaps less complex than, those discussed earlier in connection with the structure and staffing of an adjudicative authority. *See supra* notes 189-214 and accompanying text.

363. *See supra* notes 254-55 and accompanying text.

364. *See supra* notes 252-53 and accompanying text.

365. The scale on which this activity is conducted more than any other factor explains the absence of a clearly defined office procedure. Because there is no discrete intake mechanism, a focused complaint may evolve from what began as a routine telephone inquiry from a requester about "where to" or "how to." It may also take the form of a letter of complaint or develop from a referral. The identification of cases for "ombuds" handling from the various sources is informal and highly discretionary. While the Office never becomes involved in a case in which the agency appears to be processing the request in good faith and the essence of the complaint is delay, there is no other absolute criterion for exclusion, and there are no established criteria for inclusion. The approach appears to be largely a practical one, the unstated standard being does the complaint on its face seem justified and is it of the type on which the Office might provide meaningful assistance with a minimal commitment of resources. Some of the factors that affect this judgment include the seriousness of the conduct being complained of, the ease with which the merits can be assessed from the complaint itself and a simple inquiry to the agency, the level within the agency at which the matter rests, and the extent to which document review or some other form of direct monitoring would be required to resolve the complaint.

When the case otherwise "seems appropriate," the Office proceeds by contacting the agency at the level where the matter is pending. The complaint is explained and the agency is asked for its views. If the agency response indicates that there is a compliance problem, the Office explains the position of the Department on the matter and asks for appropriate corrective action. Ordinarily, given the approach used in selecting cases for inquiry, this informal and deferential approach leads to a resolution of the complaint consistent with the position taken by the Office.

The Office does not maintain detailed records of this activity. Apart from the annual statistical listing, the data can be reported only anecdotally. A "typical" case involved a complainant whose requests were being entirely ignored at the initial processing level. The official responsible had taken the position that the requests were merely part of a pattern of harassment surrounding the requester's personnel grievance and therefore should not be processed. Once the Office determined "what the facts were," it informed the official of the impropriety of his position, and he agreed to take corrective action. Metcalfe-Huff Interview, supra note 247.

366. See infra note 367.

367. As noted earlier, the current Department orders under which OIP operates, Order No. 973-82, 47FR 10809, March 12, 1982 and Order No. 1055-84, 49FR 12253, March 29, 1984, codified as 28 C.F.R. § 0.23a, do not explicitly assign an ombudsman function. The orders do, however, authorize OIP generally to "coordinate ... compliance with the [FOIA] with the executive agencies..." and "[a]dvise executive agencies on questions relating to the interpretation and application of the [FOIA]...." Apparently, this authority provides the basis for OIP's current ombudsman activity. The Attorney General could reassign this function and allocate resources to the organizational unit assigned the activity. See 5 U.S.C. § 301 and 28 U.S.C. § 510.

368. A binding determination, if practicable at all in a pilot project, would require some form of waiver of statutory rights by parties to the proceeding.

369. See supra note 174.

370. Apart from such experimentation, the available data is limited to less apt state or foreign experiences.

SELECTED

CONSULTANT REPORT

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Selected Consultant Report

THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

by

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I. INTRODUCTION

Since its passage in 1947, one provision of the Federal Tort Claims Act (FTCA), 60 Stat. 812, *codified* at various sections of Title 28, U.S.C., has been a continuing source of difficulty. The FTCA partially waives sovereign immunity in tort suits against the federal government.

The "discretionary function exception" amends the jurisdictional grant in the FTCA, *codified at* 28 U.S.C. §1346(b) (1982), by making the Act's waiver of sovereign immunity inapplicable to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved [was] abused." 28 U.S.C. §2680(a) (1982). Interpretation of this exception to jurisdiction over tort claims against the United States has critical importance for the scope of government exposure to liability and implicates basic questions raised by judicial authority to assess tort damages against the government. . The text of the discretionary function exception does little to clarify the exact scope of the exception: this language manifestly allows various interpretations. At one pole, the language could be read as exempting the government from liability whenever the government actor whose conduct gives rise to the claim has any freedom of choice in his actions. If the existence of *any* discretion suffices to trigger the exception, it very nearly swallows the Act. At the other pole, if the exception covers only claims based on acts as to which the government actor had wholly unconstrained discretion, it virtually becomes a dead letter.

The story of the FTCA in large measure has been the search for tenable interpretations between these extremes. Unfortunately, the search lacks firm support at its inception and, hence, has produced tests that, even for those who applaud their results, remain somewhat problematic. Beyond the textual ambiguity, examination of the legislative history of the FTCA is unavailing for those who seek real guidance on the meaning of the discretionary function exception. The legislative history reveals the origin of the exception in a bill considered in the Seventy-seventh Congress, and it also reveals the importance attached to the exception. Further, the legislative history contains some examples of the activities thought to be within the exception. But most of the discussion of the exception during consideration of the various bills that preceded and matured into the FTCA simply restates the exception in equally unenlightening terms. Although legislative references to this exception, thus, occasionally prove helpful, in the main the courts and others who must interpret the Act have been left on their own.

During the four-year period from 1953 to 1957, the Supreme Court addressed the discretionary function exception three times. In Dalehite v. United States, 346 U.S. 15 (1953), Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Rayonier v. United States, 352 U.S. 315 (1957), the Court attempted to resolve differences among the circuits of the court of appeals regarding the proper interpretation of the exception. These Supreme Court decisions offer a number of disparate tests for the exception. The suggestion of different tests did little to constrain the lower federal courts to a single interpretation of the exception. Moreover, the tests suggested by the Court were sufficiently vague that even the Court's eventual identification of one as the exclusive test left the application of the exception in particular cases far from certain.

For the next 25 years, the Supreme Court allowed matters to remain pretty much as they were in 1957. A recent decision, however, offers the possibility of clarifying the exception. In 1984, the Court again addressed the discretionary function exception in the *Varig Airlines Case*, United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984). The Court's decision in *Varig*, finding a general legislative intent to except regulatory activities from the FTCA waiver, appeared to many observers to give the government an important tool for resisting claims arising out of the activities for which potential liability was most troublesome.

This report looks at the role of the discretionary function exception, at the judicial treatment of the exception (especially since the *Varig* decision), and at the implications of the exception for government and for persons affected by government. Part II of the report discusses the general considerations that emerge from the legislative history and the theoretical ground suggested by these considerations on which interpretation of the exception should build. Part III relates this framework to the judicial interpretations of the exception. And Part IV explores the effects of the exception.

II. GOVERNMENT LIABILITY: THE THEORETICAL CASE

A. *Legislative History*

Interpretation of the discretionary function exception, like any other statutory term, should be rooted in the text and history of the statute. Under most circumstances, it would be quite peculiar to begin any interpretive effort with abstract, theoretical considerations. In the case of the discretionary function exception, however, the text and history are so abstruse as to yield only modest direction toward just this sort of consideration.

The key congressional statement on the exception declares:

> This is a highly important exception, intended to preclude any possibility that the [FTCA] might be construed to authorize . . . a claim

> against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The [Act] is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common law torts of employees of regulatory agencies would be included within the scope of the [Act] to the same extent as torts of nonregulatory agencies.

H. Rep. No. 2245, 77th Cong. 2d Sess., at 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess., at 7 (1942); H. Rep. No. 1287, 79th Cong., 1st Sess., at 5-6 (1945). This statement largely rephrases the discretionary function exception without appreciably clarifying it.

The statement does, however, suggest a starting point for analysis of the exception by distinguishing three different categories of administrative activity. First, the legislative statement indicates that some matters may be so fully committed to administrative discretion as to preclude judicial examination of the substance of the administrative decision. Second, the statement suggests that other discretionary administrative decisions may be subject to judicial review for abuse of discretion or for negligence in the execution of the discretionary decision, but that private damage actions are not the proper vehicle for such judicial review. The generality of regulatory actions by regulatory agencies provides the paradigm for this second class. Third, the statement contemplates some administrative activities that are comparable to ordinary acts of employees of ordinary businesses and that, if performed by such employees, would subject their employers to liability for garden-variety common law torts. The legislative reports containing this language specifically identify "an automobile collision caused by the negligence of an employee" of the government as typifying this third class. The discretionary function exception is intended to screen out the first two classes of executive conduct from the statutory waiver of immunity from liability but leave the FTCA as a vehicle for securing damage relief against the third class of government actions.

At first blush, the rationale for the exception can be seen in the division between the first and third categories. The first category describes acts as to which judicial supervision is undesirable; for these acts, the administrative decisionmaker is thought to be better positioned to make the right choices than anyone else, including a judge. The third category describes acts as to which judges have a well worked-out stock of examples by which to separate proper from improper behavior. There is nothing in the selection process or training or working environment for administrators that makes them likely to be superior decisionmakers with respect to these acts: a trial judge is certainly at least as trustworthy a social decisionmaker regarding the proper allocation of responsibility for an automobile accident as the supervisor of the government employee who was involved in the collision. The discretionary function exception, thus, appears to facilitate allocation of decisional authority to the actors best positioned to make each decision.

But what of the second class of acts? Why are judges trusted to overrule other decisionmakers when issuing injunctive or declaratory relief but not when asked to provide damages? Plainly, something more than decisional competence is implicated in the discretionary function exception. The exception also must be explicable on the basis of the differences between damage suits, or at least damage suits sounding in tort, and other forms of judicial review. Defining the boundaries of the discretionary function exception hence requires not only elaboration of the differences in judicial and administrative competence (a matter taken up *infra*) but also examination of the nature of the tort liability underlying the FTCA.

B. Liability Suits: Compensation and Deterrence Goals

1. Tort Goals: Gateway to an Open System

One avenue to understanding the nature of tort damage suits begins with the goals for such suits. The goals of tort liability are matters of broad consensus: liability serves both to compensate the injured and to influence the behavior of those who can cause injuries. These goals provide the jumping-off point for analysis of tort liability, but identification of the goals of tort liability is the only step in analysis of tort law that is relatively free from controversy.

Controversy over tort liability comes in part because it is not possible to treat tort law as a closed system. The absence of unique goals for tort law adumbrates the problem. Neither the compensation nor the behavioral (deterrence) function is the exclusive preserve of tort law. The compensation function can be performed through insurance (health care insurance, life insurance, disability insurance, and so on) or through programs administered by private enterprises (such as the American Red Cross) or by government (Social Security or Medicare, for instance). Indeed, many of the injuries for which damages are sought in tort litigation also trigger compensation from one or more of these other sources. (Multiple source compensation is allowed by the collateral source rule.) Similarly, a variety of means exists for controlling individual behavior, for bringing it into line with social good (as opposed to purely private good). This is true generally, but it is especially true for the behavior of government officials (a term I will use synonymously with employees). Their behavior is constrained by monitoring from other executive officials, by legislative directives *ex ante* and legislative oversight *ex post*, and by substantive judicial review as well as by government tort liability. More generally, officials' behavior is constrained by personal motivations and beliefs. The existence of alternative mechanisms for securing compensation and for deterring undesirable behavior must be taken into account in structuring tort law, else tort law will be redundant, irrelevant, or misguided.

2. Compensation

Of the two goals, compensation provides the more manageable starting place. The compensation goal is advanced in tort law not simply by awarding money to anyone who is injured but by placing the burden of compensating for accidental loss on the (causally related) party most able to bear the loss. Thus, a party who can spread losses over a number of individuals or events is a better loss-bearer than a single individual who has no capacity to distribute losses over a class of similarly situated individuals or over a series of similar events. The availability of loss-spreading regimes other than tort litigation (such as insurance against injury) and of loss-spreading regimes that complement tort litigation (liability insurance) makes compensation analysis less straightforward in many cases than it at first appears. The issue becomes less one of finding money to offset the physical, psychic, or financial injury suffered by *this* plaintiff than of ascertaining whether the class represented by plaintiff is better-positioned (or worse) than the class represented by defendant to bear the *risk* of loss in a world where insurance and other mechanisms for spreading that risk are available.

Where the federal government is party to the potential tort suit, however, the compensation argument is simplified considerably. The federal government is a better loss-spreader and risk-bearer than any other party in almost every conceivable circumstance. So far as compensation is concerned, any exception to federal liability for harm causally-related to the government's activities bears a heavy burden of justification. Indeed, so far as compensation is concerned, the causal relation requirement can be dropped. Although the FTCA's legislative history contains a declaration that the Act is to serve broad remedial purposes, the existence of any limitations on the government's liability -- much less an extensive set of exceptions -- suggests the importance of behavioral concerns to definition of the Act's scope.

3. Deterrence

From the standpoint of tort law's behavioral goals, matters are much less clear than where compensation is the goal. The general, deterrence-based explanations for tort law posit some social ideal for behavior. When other incentives induce individual behavior that departs from the ideal, tort law can serve as a corrective. Typical examples concern an activity by one party that harms a second party (or group) that cannot induce ideal behavior without tort law's help. For example, the threat of liability to hapless pedestrians might cause an automobile driver with a taste for high speeds and controlled substances to increase his reliance on taxicabs or to make greater use of the Utah salt flats; or a business that would pollute a stream (as a by-product of the most efficient production process, legal controls over pollution aside) can be constrained by threat of liability to downstream parties to reduce its level of pollution.

Even the simplest cases now are recognized as presenting several difficult issues. The examples above involve what appears to be a harm-causing actor and a powerless victim. Yet, Professor Ronald Coase has demonstrated that both parties play a role in causing or in avoiding the injury. The pedestrian can take precautions against reckless drivers (including, at the extreme, never crossing a street -- a practice some New York denizens find expedient) and the downstream parties can use substitutes for the stream (they can fish in ponds, drink seltzer, and swim in man-made pools) or invest in purifying the stream. In many cases, the least costly means of avoiding injury is for the "victim" rather than the "injuror" to alter his behavior. That is, if the potential injuror and potential victim sat down together to decide how ideally to organize their competing activities (how optimally to reduce the risk of injury), there are occasions when the injuror would be willing to pay the victim (enough for the victim willingly to change his behavior) and not the other way around.

From this observation, Coase elaborates his now well-known argument that where the interested parties costlessly can negotiate and enforce agreements, liability rules may be unnecessary to effect ideal behavior and also will be relatively ineffective at inducing any change in behavior. Coase, *The Problem of Social Cost,* 3 J. L. & Econ. 1 (1960). Of course, tort liability rules seldom deal with situations in which parties can negotiate and enforce agreements costlessly. While this point is made with excessive regularity, Coase's work fruitfully suggests the importance (for assessment of the behavioral effects of tort law) of inquiry into the means by which each party can affect the situation, the values each party places on various outcomes, and the parties' capacities for extra-judicial resolution of conflicts, including conflicts arising out of legal entitlements such as those protected by liability rules. In the usual case, thus, behavioral analysis of tort law confronts the following series of questions: what is the ideal solution to conflicting interests? what can be done to bring about the ideal? what sort of liability (or nonliability) rule will induce each class involved in the conflict to contribute what it should to achieving the ideal solution?

4. Behavioral Goals and Tort Law

An extensive literature explores these questions and suggests answers to them. Many contributions to this literature have come from authors working within the paradigms of law-and-economics. These commentators generally take allocative efficiency as the goal for society. Efficiency can be used in different senses, but usually indicates the least costly means of implementing either (1) the solution to conflicts over the levels and organization of various activities that interested parties unanimously would endorse (Pareto efficiency) or (2) the solution that represents greater total value than any other solution (Bergson-Samuelson efficiency, sometimes referred to as Kaldor-Hicks efficiency). These concepts are not free from argument as norms, nor is their practical import readily assessed in situations where affected parties cannot easily display their preferences for conflict resolution (as they could if negotiating and enforcing an agreement were costless or if well-functioning, competitive markets existed for the goods in dispute). But the goals endeavor to capture social consensus values, and much of the writing about torts from the perspective of law-and-economics is compatible with virtually any generally accepted set of behavioral goals. For the moment, discussion will elide the difficult issue of more precise specification of the social goal to be served by tort law.

While writings about tort law identify various features of current law that seem ill-suited to secure socially ideal behavior (assertions of a liability or liability insurance "crisis" with respect to medical malpractice or pharmaceutical products or municipal operations are the visible, popular analogues to these works), a large body of work finds tort law generally congruent with social good and suggests several aspects of tort law that help to align its behavioral effects with social good. These aspects of tort law can be sorted into four rough categories.

First, there are basic "gatekeeper" rules. To pass the first hurdle in tort litigation, a plaintiff must identify a personal injury suffered arguably as a result of conduct by the defendant in violation of a duty the defendant owed to plaintiff. More than a few potential suits fail to clear this hurdle. The personal injury, duty, and causation requirements provide an initial filter against suits where liability would be highly likely *not* to promote socially advantageous behavior.

Second, tort law consists largely of a series of sorting rules, channeling suits into categories according to predictions of consonance between particular private actions and public good. A first cut at the sorting-out process distinguishes between strong entitlements and weak entitlements. In some circumstances, even though it is appropriate to say, with Coase, that two actors jointly cause an injury, social good almost invariably will be advanced by having one of the two, and not the other, change his behavior. Protections against intentional injury and claims associated with property rights generally can be classed as strong entitlements fitting this description.

In the case of weak entitlements, the plaintiff who passes the first gatekeeper hurdle has some positive prospect of showing that not he but defendant should engage in different conduct, but not so strong a prospect as in the former case. Weak entitlements account for the lion's share of tort suits. Hence, a second sorting-out rule is called for. Tort law divides the weak entitlement cases into two groups. In one group are those cases where it seems more likely that the defendant will be able to reduce the risk of injury at lower cost than plaintiff. These are the so-called strict liability cases. The remaining group of weak entitlement cases, where it is less clear which party categorically will be better positioned to reduce risk of injury, require proof of defendant's negligence (that is, proof that defendant could at reasonable cost have avoided the injury).

Third, after suits have been sorted, each category requires that certain elements be proved by plaintiff to establish a sufficiently increased probability that recovery will serve social goals to sustain a strong presumption in his favor. Even after this showing is made, defendants have an opportunity to establish that their behavior accorded with social good (as where justifications are offered for otherwise tortious conduct) or that plaintiff's behavior deviated sufficiently from the ideal to negate the presumption that recovery against defendant would advance social goals. The paradigm of this last defense is comparative negligence, which, when the socially optimal solution requires adjustment of both plaintiff's and defendant's behavior, pro-rates any damage award according to the degree to which each party's departure from ideal behavior contributed to the injury.

Fourth, tort suits are governed by procedures that are intended to promote the behavioral goals of tort law at relatively low cost. Thus, for example, doctrines such as *res ipsa loquitur* shift the burden of persuasion when it seems more likely that information rests with the non-moving party.

Obviously, the assessment of social good and of the behavior that advances it are difficult in many cases, but the sequence of rules that governs tort litigation provides at least a plausible route for obtaining socially useful behavior in the ordinary circumstances respecting private litigants to which this body of law generally applies.

C. Behavioral Concerns in Suits Against the Government:

Competence and Cost

1. Torts and the Government Defendant

The FTCA builds on this framework not by adopting *in toto* the states' common law of torts, but by allowing recovery against the government for negligence (and in some exceptional instances for intentional torts) "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674 (1982).

While signalling acceptance of the approach common to state tort law, those who enacted the FTCA plainly did not trust that law appropriately to resolve all claims against the government. The FTCA provides a different sorting process than common law: the Act, in effect, decrees that all suits against the United States begin with the assumption that the administrative arms of the government are not likely to have behaved improperly.

If the behavioral goals that inform tort law also inform the FCTA and if these goals can be presumed to be advanced by common law decisionmaking in ordinary circumstances respecting private litigants, what difference does importation of the government as a party defendant make? This question leads back to the decisional competence point raised earlier, but it also implicates a second concern. These concerns have supported a longstanding tradition of different treatment of suits against sovereign governments in the United States even though the notion of personal sovereignty has no application here. Judge Harry Edwards, writing for the U. S. Court of Appeals for the District of Columbia Circuit, makes the point in tying construction of the FTCA (in fact, the discretionary function itself) to the bases for sovereign immunity, the background doctrine for most disparate treatment of government and private defendants:

> The modern policy basis justifying sovereign immunity from suit has three principal themes. First, and most important, under traditional principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches. Second, consistent with the related doctrine of official immunity, courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers. Third, in the interest of preserving public revenues and property, courts should be wary of creating huge and unpredictable governmental liabilities by exposing the sovereign to damage claims for broad policy decisions that necessarily impact large numbers of people.

Gray v. Bell, 712 F.2d 490, 511 (D.C. Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984).

Judge Edwards' dictum directs attention to the factors that make suits against the government special. These factors perhaps can be seen more clearly if they are recharacterized in terms of two variables: errors and error costs. The initial theme identified by Judge Edwards relates to the error term.

2. Minimizing Errors

DEFERENCE: A FIRST LOOK

Deference to "policymaking acts of coordinate branches of government" is justified only by belief that one branch of government is more likely than another correctly to identify the social ideal for a particular decision. Generally, the social ideal relevant to government conduct will not be deducible from abstract principles but will be given by positive law: putting aside questions of statutes' consistency with the Constitution, the social ideal will be defined by Congress. Where Congress has spoken clearly, the law at issue will detail the course to be taken by the administrator whose acts are at issue.

Unfortunately, Congress seldom identifies in clear and detailed language the administrative course to be followed. Instead, legislation commonly reflects the divergent interests that shaped it and the incompleteness of information necessary to decide how any one goal for the legislation should be implemented, much less how some harmonization of heterodox goals should be accomplished. Administrators, thus, routinely are assigned the task of giving effect to ambiguous legislative commands. So, too, are courts. The question relevant to FTCA analysis is which branch Congress intends to make a specific determination. Here, again, the Congress seldom speaks clearly.

Rarely does Congress plainly insulate administrative judgments completely from judicial review. The Administrative Procedure Act (APA), *codified at* 5 U.S.C. §§551-559, 701-706 (1982), provides a general right of judicial review for all final administrative action. The Supreme Court has interpreted the APA as authorizing judicial review in all but the truly exceptional cases in which the Congress explicitly proscribes review or cases in which the grant of administrative discretion is so broad and uncabined by legislative directives as to leave the reviewing courts "no law to apply." *See* S. Rep. No. 752, 79th Cong., 1st Sess., at 26 (1945); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

But this general right to review is only half the picture. The APA gives ample evidence of Congress' intent to provide some insulation to administrative decisions, for instance allowing judicial reversal only for abuse of discretion where administrators are given some freedom to decide among a congressionally restricted set of options. 5 U.S.C. §706(2)(A) (1982). Some classes of administrative action, while formally reviewable, as a practical matter have effectively been placed off-limits because judges do not feel comfortable second-guessing those administrative decisions, notably those implicating prosecutorial discretion. *See* Heckler v. Chaney, 470 U.S. 821 (1985); Dunlop v. Bachowski, 421 U.S. 560 (1975). And both the APA and judicial decisions (of ambiguous basis) limit the occasions for judicial review by imposing standing requirements on those who seek review, requirements that often are informed by judgments regarding the relative competence of courts and administrators at particular sorts of decisions. *See* 5 U.S.C. §702 (1982); Linda R.S. v. Richard D., 410 U.S. 614 (1973).

These determinations of the appropriate occasions for judicial supervention of administrative decisions, for judicial abstention, or for deferential review have been the subjects of extensive commentary. Commentators' views on the appropriate dividing lines among these categories vary widely. Nearly all commentators, however, agree that for a broad range of cases, courts' dispositions of disputes over entitlement to or scope of judicial review defy organization into a clear pattern. Two veteran observers of this game state the complaint boldly: "the rules governing judicial review have no more substance at their core than a seedless grape." Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

DEFERENCE: A CLOSER LOOK

Yet, surely, this overstates the case; the statutes and case law provide some guidance as to when judges do or should feel fully comfortable, slightly discomfited, or wholly out of place revising administrative determinations. For analytic purposes, six types of decision can be identified, each with a generally recognized level of judicial deference:

Category:	**Level of Judicial Scrutiny:**
(1) Law	No Deference
(2) Fact/Descriptive	Slight to No Deference
(3) Fact/Inferential	Slight Deference
(4) Judgment/Ordinary	Some Deference
(5) Judgment/Scientific	Significant Deference
(6) Judgment/Political	Substantial to Full Deference

Although it readily must be admitted that assignment of particular decisions among these categories is more a matter of art than of science, and plainly is not impervious to manipulation, the categories are by no means wholly indistinguishable. The Law category is in many ways the most problematic and will be taken up last.

The Fact/Descriptive category comprehends decisions on matters of descriptive or historical fact. In an unfair labor practice proceeding, the National Labor Relations Board might ask, did the employer make a particular statement to the union steward? Or the National Oceanographic and Atmospheric Administration (NOAA) at the Department of Commerce might ask, did the Weather Service attempt to repair a given faulty buoy? when, and how often? When the administrative decision at issue in court is a decision on the nature of an historic fact (as in the NLRB example above), it generally receives a slight measure of deference from the reviewing court, more as a matter of judicial economy than out of a sense of greater administrative competence. Challenges to an administrative decision of historic fact do not implicate issues peculiarly within the administrators' field of knowledge and when such decisions are contested (as in a suit against the Weather Service for faulty weather prediction due to negligent failure to repair a malfunctioning signal buoy), courts usually feel free to inquire into such matters without any reliance on the expertise of the administrator to answer the factual issue.

The Fact/Inferential category denotes decisions, usually predictive, that extrapolate from known facts. The Federal Trade Commission might predict, from what it knows about consumer reaction to advertising and from facts respecting the effects of smoking tobacco, that reference to mild taste will mislead consumers about the effects of cigarette consumption. Or the Occupational Safety and Health Administration may predict, from limited historical evidence, that a negligible number of workers in the gasoline refining industry will wear protective gear to reduce hazards from exposure to benzene. In every complex decision, numerous such factual inferences must be drawn. Generally, the courts give administrators greater leeway on this sort of decision than on matters of descriptive fact. Absent some special reason for thinking the decision beyond the judicial ken, however, deference on factual inferences is limited.

The Judgment/Ordinary category is closely related to the preceding category. It differs in context, largely describing informal decisions rather than those made in conjunction with a formalized adjudication or rulemaking. The decision of a cartographer working for NOAA whether or not to depict a 150-foot high tramway cable on a sectional map is an exercise of ordinary judgment: the cartographer decides whether the cable constitutes a sufficient hazard to air traffic to offset the cost of adding to the crowding on the map (chiefly a cost in increased difficulty in reading the map for other hazards). No special scientific training or political instinct is required to make this sort of judgment, but the cartographer makes it more frequently than the judge and is reviewed by a supervisor who sees more such judgment calls than does a judge. Ordinary judgments of this sort get some deference, but they also are not infrequently overturned on direct review.

The remaining categories of judgment secure greater judicial deference. Scientific judgments -- how should the rocket boosters for the National Aeronautics and Space Administration's space shuttle be designed? what dangers are posed by use of dioxin-contaminated earth as residential landfill? how will the risk of leukemia be affected by a reduction of benzene exposure from ten parts per million parts ambient air to one part per million? -- often rest on information that is (or can be made) accessible to reviewing courts. But judges are not trained at evaluating such information, and scientists are. Courts at times reverse (and more frequently vacate) scientific judgments; in the main, however, these judgments (when made by officials with significant science training) arrive in court with a stronger presumption of validity than do ordinary judgments.

So, too, for political judgments. A variety of government decisions are more or less explicitly turned over to political judgment of administrative officials. The NLRB's resolution of most conflicts adjudicated under the NLRA, the FCC's choice between competing applicants for broadcast licenses, the FTC's decision to pursue a complaint against one company rather than another, the FAA's decisions to use its limited resources to conduct one type of inspection rather than another -- all these are decisions that involve political judgment. They present issues that cannot readily be resolved from descriptive facts regarding any given incident standing alone. The principal guarantee that these decisions have been made rightly lies in commitment of the decisions to politically selected decisionmakers, those who have satisfied the appropriate actors in our political system that they have the requisite instincts for resolution of these issues. When judges conclude that an issue is properly one of political judgment, they give the administrative decision considerable deference. Indeed, the "political question" doctrine is a judicially-created vehicle for granting complete deference to certain governmental decisions that are clearly matters of political judgment.

The final category, decisions of law, presents the one matter as to which judges are expert. Here, they give no deference to the administrative decision as the APA and numerous court decisions make plain. It is the courts' mandate to determine whether the authority governing a particular decision has made the decision one of law or of judgment, whether there is a mandate that facts be found, and if so what type. The judicial law-declaring power, however, does not mean that courts ultimately decide all questions initially framed as legal issues, with no role for administrators. The courts often find that the law's ambiguity on a specific point combined with the commitment of broad authority to the administrator charged with the law's effectuation indicates the lawmakers' intent to make decision on that point a matter for the political judgment of the administrator. A classic example of this sort of judicial construction of law is National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111 (1944). In a sense, thus, the law-declaring power is a wild card, allowing the courts to construe statutes as granting administrators great leeway for judgment or little as the judges think appropriate in any given case. Yet, despite the apparent breadth of this judicial tool, Congress and the President (complain as they might about any specific judicial construction of the law) seem generally satisfied that the judges have been playing by the rules and sorting decisions into the apposite review categories.

The benefit of the judicial sorting along these lines is its contribution to minimizing erroneous determinations of social good in settings in which the political process (subject to the Constitution) defines social good. If the courts reversed all the administrative decisions with which they disagreed, some significant number of court decisions would then be overturned by the political actors. Of course, as with Coasian bargaining among private parties, because this government action is costly, it will not take place in response to all court decisions that political processes would have made differently.

DEFERENCE AND TORT CLAIMS

The exceptions to the FTCA, the discretionary function exception aside, take out of judicial hands a number of decisions that appear to merit considerable deference. The Act, for instance, expressly precludes claims premised on injury from the government's fiscal policies or regulations of the monetary system. These policy decisions are quintessential political judgment matters. Just as plainly as these decisions would be deserving of strong deference from courts, so, too, it seems unexceptional that they would be removed from the ambit of government acts subject to challenge as tortious.

The exceptions, however, systematically go beyond acts that are clearly political. The FTCA does not except only policy decisions on fiscal matters or policy decisions on regulation of the money supply: it excepts "[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." 28 U.S.C. §2680(i) (1982). Similarly, the Act does not except only tax policy decisions, but rather all claims "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. §2680(c) (1982). Rather than excepting only war policy decisions, the Act excepts "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j) (1982).

These exceptions encompass not only acts of political judgment but acts of ordinary judgment as well; even simple factual mistakes are shielded by these exceptions. The negligent misassessment of a tax by a minor functionary in the Treasury Department is excluded from the FTCA. Erroneous execution of monetary regulations is excluded. Mistaken detention of persons or goods by customs officials is outside the Act. Negligent firing of a battery of ship's guns at our own shores during time of war would not be covered by the FTCA.

While some of the acts that fall within these and other exceptions to the FTCA are so fully committed to political judgment as to defy meaningful judicial review, most of the excepted acts involve judgment of a sort that normally would be reviewable directly by courts. If some deference is owed to the judgment of the executive officials acting in the first instance, courts nonetheless routinely scrutinize the basis for detention of persons or goods in a variety of contexts. The propriety of tax assessments, likewise, is generally subject to judicial review. Certainly, the exceptions to the FTCA extend well beyond the core "policymaking acts of coordinate branches of government" singled out by Judge Edwards as inappropriate objects for judicial review.

DEFERENCE, ERRORS, AND EXCEPTIONS

Why, so far as appropriate allocation of decisional authority is concerned, are the FTCA exceptions not more narrowly tailored? Although many of the acts covered by the exceptions seem to fall somewhere within the range of judicial competence, perhaps the context of the acts or of the review they receive alters the expectation of judicial accuracy in deciding their propriety.

Tort Liability, Resource Allocation, and Social Good

The exceptions focus on acts that, if not themselves immediate products of political judgment (which would merit strong judicial deference), are related to such acts. The direction in which a naval officer points a ship's gun is not determined definitively by considerations of high national policy; it does not follow inexorably from the decision of Congress to declare war. But it also is linked to a plethora of politically-charged decisions respecting investment choices, including the amounts to be committed to defense versus other goods, to naval forces versus other military forces, to training versus equipment, and so on.

These resource allocation choices inevitably are drawn into issue in tort litigation. This is the essential decision made by courts when assessing allegations that an accidental injury occurred because defendant negligently performed some activity. Then, for example, a court finds a private security services company liable for the negligent firing of a gun by one of its guards, it implicitly makes the judgment that social good requires greater investment in selecting, training, or policing private security guards or a reduced level of the company's security guard activities. If the court asks whether firing of a ship's gun in the wrong direction was negligent, it must attempt a similar evaluation of public, resource-allocation decisions precedent to that incident.

A broad range of government activities in each of the areas noted above, thus, may be excepted from the Tort Claims Act in part because of concern that judicial decisions in this context will be in error. The implicit judicial judgment about the related investment choices implicated in these cases stands no greater chance of correctly identifying the social ideal than do the political and administrative processes that produced what, viewed in isolation and in retrospect, may seem an unacceptable level of risk of injury. In other words, even though the specific acts at issue are not of a kind that ordinarily would be insulated from judicial review, there is still a fear that courts would commit more errors in assessing these issues than would other branches of government.

This fear of judicial error is difficult to pin down. At one extreme, the argument insulates *all* government conduct from review. The degree of training and supervision the government driver receives, the hours he works, the frequency and duration of his trips and the care with which he is selected influence the likelihood that the government driver will be involved in an automobile accident. These matters, too, implicate political judgments on resource allocation. Surely, the FTCA cannot be read to insulate the government from liability for any act connected in any way to political decisions. Further, the fear of erroneous disposition of cases in which political judgments are seriously insinuated may simply be misplaced. Courts certainly have seemed in some instances acutely aware of the implications of their decisions for political judgments on investment of government resources, even where the claim before the court narrowly addresses a specific decision by a low-level official who assertedly has acted improperly. The cases on prosecutorial discretion are exemplary.

Pity, Hindsight, and Error

An alternative explanation for the apparent fear that judicial decisionmaking would err on the issues excluded from the ambit of the FTCA might look to the context of the review itself. Perhaps, judicial review of government action is more prone to err in damage suits than in direct review actions.

There are two parts to the argument, focusing on the *ex post* nature of damage claims and on the emotional appeal of injured parties. Although many review actions are brought before injury has occurred, damage actions almost never are. Because behavioral concerns in negligence cases compare the risk of injury to the cost of avoiding (reducing) it, damage actions require courts to assess *after* an injury the *ex ante* probability that it would occur. As the injury already *has* occurred, courts systematically may overestimate the probability that it *would* occur. (It is not clear whether there is a systematic skew to assessment of risk *ex ante.*)

Moreover, when courts are confronted with an identified individual who has been harmed by conduct that, viewed alone, seems inappropriate, the courts may be more likely to find that conduct wrongful than if courts look at a class of government actions. Tort damage actions inevitably review defendants' actions in the former context. Of course, many direct review actions also present claims by identifiable, injured, individuals. But the influence of this setting on the judicial decisionmaker may be greater where the question is whether money should be paid to the plaintiff than where the issue is simply the propriety of the government's actions.

Thus, the concern over erroneous judicial decisions arguably supports exceptions of the breadth suggested by various provisions of the FTCA, but the argument that these exceptions minimize errors is certainly debatable. While consistency with other exceptions would suggest a sweep to the discretionary function exception that goes beyond insulation only of core political judgment calls, understanding the limits of the exception requires a better basis for the breadth of other FTCA exceptions than fear of judicial error. That basis is provided by the second variable identified above: error costs.

3. Reducing Error Costs

If concerns over judicial error only arguably support broad exclusions from the FTCA, are there stronger reasons for belief that the costs of judicial errors will be greater in damage actions against the government than in other contexts? Two possible bases for this belief exist, discussed below under retroactivity and process variables.

RETROACTIVITY AND ERROR COSTS: THE LINKAGE

Most legal actions other than damage suits operate prospectively. Declaratory and injunctive suits generally require one party to eschew a given course of conduct for the future, or to follow it only with the consent of another party. This form of relief allows considerable flexibility for parties to restructure their activities by private agreement or to overrule the (non-Constitutional) judicial decision through legislation (or to persuade another court to adopt a different rule). The capacity for such adjustments minimizes the impact of orders emanating from these forms of legal actions. If the judicial decision is in error, as judged by the affected parties' or political actors' preferences, thus, the error need not result in permanent misordering of social activities. Although "recontracting" costs may be sufficiently great in some contexts to preclude revision of erroneous judicial orders, other things equal, the most significant errors are likely to lead to revision.

Damage actions, however, are different. They provide monetary awards to successful plaintiffs as retroactive relief for actions already taken and injuries already suffered. Several consequences follow from this difference. Notably, retroactivity significantly raises the cost of erroneous judicial decisions. As with prospective relief, so far as the circumstance can be characterized as part of a class of events predicted to recur, liability will lead to revisory efforts aimed at future incidents: private agreements or legislation will be deployed to alter the outcome suggested by the court when courts' liability rules err. Judicial errors in damage suits and non-damage suits alike, hence, generate two types of error cost: (1) the cost of recontracting (including legislative rule change) efforts, and (2) the cost in deviation from the social ideal of rules that are too difficult (costly) to revise by law or contract. In addition, however, erroneous decisions in damage actions impose social costs equal to the damages wrongly awarded or denied. The erroneous decision of itself confers a windfall gain or loss on the parties to the litigation While the parties may restructure activities or alter legal rules for the future, they cannot escape this immediate, case-specific cost of the decision.

The award of retroactive relief with attendant case-specific costs to erroneous decision, therefore, is likely to involve greater error costs than will other relief. This form of relief is not in fact confined to damage actions. Affirmative injunctive relief involves the same retroactive effect and error costs. *See, e.g.*, P. Schuck, Suing Government (1983); Diver, The Judge as Political Power Broker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43 (1979); Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980). But such increased error costs are the general case for damage suits and only the special case for other legal actions. Retroactivity, thus, provides a plausible basis for the belief that damage suits will generate greater error costs, even given a constant rate of errors for damage suits and other forms of judicial review.

RETROACTIVITY, SYMMETRY, AND ERROR COSTS

Association of higher error costs with damage suits brings us only part-way to the explanation for broader exceptions to government liability than to direct review. Error costs not only must be greater in damage actions; they also must be asymmetrically distributed. The erroneous refusal of damages as well as the erroneous imposition of liability creates case-specific error costs. Under standard assumptions about litigation, explored further below, symmetric distribution of these error costs should yield little net effect on prospective parties to litigation. If concern over error costs justifies broad exceptions to liability, there must be some reason to believe that the government (the public generally) will bear a disproportionate burden of this error cost.

The most obvious possibility is that errors systematically favor plaintiffs; were that so, even a symmetrical distribution of costs from error in any ;given case (costs of erroneous assessments of liability exactly equal to costs of erroneous failures to assess liability) results in an asymmetric distribution of costs overall, with greater total error costs from liability than from non-liability decisions. The discussion above indicates some, but not much, basis for that belief.

The alternative explanation is that erroneous findings of liability generate greater error costs than erroneous findings of non-liability, so that even an equal distribution of errors could produce greater error costs from liability. The costs of the windfall gain or loss in the individual case are symmetric, so the argument must be predicated on different reactions to the expected probability distribution of judicial errors.

The ordinary supposition is that expectation of positive (non-zero) rate of judicial errors will not significantly affect behavior (as compared with behavior under an error-free judicial system). Several rationales support this assumption. The expected error rate may be trivial. The (expected) errors may have offsetting effects. Or the efficient response to the errors may involve no alteration of behavior. Erroneous determinations of liability in strict liability torts, for instance, should not alter the amounts potential defendants expend on liability avoidance, as efficient accident-avoidance investments also are optimal liability avoidance investment with or without judicial errors. In negligence regimes, this may not be so, as the discontinuity in expected liability costs at the judicially determined negligence point may induce potential defendants who are concerned about judicial error to invest beyond the optimal accident-avoidance level. But in the ordinary case this last effect should be quite modest and may be countered by other factors not relevant here.

A few cases, however, involve peculiar reaction to the prospect of erroneous liability decisions. These cases begin with an atypical distribution of the costs and benefits of the activity at issue. Defamation is illustrative. The traditional tort law of defamation gave fairly generous protection to reputation on the assumption that, while reputations are fragile, the harm from injured reputations is difficult to prove. The constitutionalization of defamation law, beginning with New York Times v. Sullivan, 376 U.S. 254 (1964), limited the protection of reputations out of a fear that discussion of public officials would be easily chilled by the threat of liability for defamatory false statements about them. The fear of chill derives from an asymmetry between the benefit of (true) statements about public officials and the costs of (false) statements. The public benefits from the former but, because of the difficulty of preventing the dissemination of information once disclosed, the originator of the information seldom captures a very large share of its values. The costs of false statements, however, so far as they are reduced to a damage judgment, are borne entirely by the defendant-originator. Hence, the Supreme Court intuited, the threat of liability for defamatory statements will lead speakers (who can not recoup the full cost of investing in greater investigation of truthfulness for some portion of statements about officials, even though the social value of those statements exceeds that cost) to reduce their output of speech about public officials.

The Supreme Court could have addressed this problem by requiring proof of negligence in these cases. Under this regime, no defendant would be liable unless it was unreasonable for him to make the defamatory statement. This standard could take account of the private costs and returns from investing in greater scrutiny of the offending statement's truth. Negligence would protect all reasonable authors-speakers, however, only if this determination were free from judicial error. The prospect of any error leaves the speaker at risk, and valuable speech, thus, still would be deterred. The Supreme Court, therefore, concluded that liability for defamation of public officials is constitutional only if the defamatory statement is made with knowledge of its falsity or reckless disregard of its possible falsity. While the Supreme Court's analysis of defamation may be questioned, the Court rightly appreciated that some classes of defendants will be unduly apprehensive of liability, and that imperfect judicial decisionmaking exacerbates any tendency to such overreaction.

The question in government torts cases is whether for some class of cases a similar asymmetry obtains. Undoubtedly, a variety of government decisions presents just this sort of problem. If for no other reason, this is so because the probable benefits of one course of action may be diffuse and invisible while its potential costs are concentrated and readily apparent; an alternative course of action may yield lower benefits but nearly invisible (if greater) costs. Sam Peltzman's evaluation of the 1962 amendments to the Federal Food Drug and Cosmetic Act makes the point. If a drug is approved by the Food and Drug Administration (FDA) for use in humans, the benefit of the drug will be experienced by its users as some increased probability of improvement as compared to an alternative drug. The cost will be some statistical probability of harm, such as the birth defects associated with thalidomide or diethylshilbestrol (DES). Few users of the drug will be aware of the extent to which their condition is made better by this, as compared to an alternative, drug. Fewer yet will applaud the officials at the FDA who approved the drug. If, however, a group of users is adversely affected, they will be quicker to associate their harm to the particular drug and to attach blame to the administrators who authorized its use as well as the manufacturer who produced it. FDA officials, thus, are said to have too great an incentive to delay drug approvals.

If these officials were *personally* liable for the harms from improperly authorized drugs, the rate of drug approval would no doubt, from a social perspective, be intolerably low. As with defamation, a negligence standard in theory could suffice to protect these officials: all they need do is act reasonably in approving drugs to avoid liability. Yet, every official recognizes the possibility that, *ex post*, a court may decide that his action was not reasonable. Even with only a very slight risk of an erroneous judicial imposition of liability, fear of this decision will cause the official to eschew not only actions that might be questionable but an array of actions that no reasonable person *ex ante* would dispute: given the high potential liability and the negligible (personal) costs of delay, the barest use of liability could dissuade the official from approval.

Peltzman's description of FDA incentives seems compelling (to one who has had no experience with the FDA), and the extension of his analysis to the liability context seems the unexceptional. To be sure, there must be some countervailing pressures on the FDA to approve drugs readily. Even though the individual benefits from such actions are not generally apparent, and often not even to those immediately benefited, the benefits can be seen by those who would profit from the approval, the drug companies. If drugs are beneficial, the value of the improvement generally will be captured by the producer who for many purposes should be seen as the equivalent of a concentrated, visible affected group. Surely, the FDA official will be pressed by drug companies to act with at least all deliberate speed. Still, the persuasive powers of these companies seem generally overmatched in this context by concerns about more dramatic harm more dramatically visited upon the official from approval of a harmful drug. If the asymmetry is less than at first appears, it nonetheless seems likely to exist and to increase the cost of official reaction to anticipated judicial errors.

The reaction of officials to the asymmetric threat of liability will not be so strong where liability is visited upon the enterprise (the United States) rather than directly on the individual. At the same time, this difference easily can be overstated, especially where catastrophic injuries (enormous injury costs) are in issue. The individual official (usually) has tightly limited resources. Of course, he will worry considerably about the risk of a personal financial liability sufficiently large to induce bankruptcy. But from the fairly low level (in macroeconomic terms) at which this occurs to the dramatically higher levels of injury possible as consequences of his official actions, the individual will not make distinctions based on the threat of personal liability. *See* Shavell, The Judgment Proof Problem, 6 International Rev. L. and Econ. 45 (1986). If the enterprise is liable, however, these differences among levels of potential liability become meaningful. If damages for wrongful approval of Thalidomide or of DES or for failure to restrict use of asbestos or use of Agent Orange or similar large-scale potential liabilities are in issue, the costs in personal time, in career opportunities, and in public exposure for the individual official at the pivot of an enterprise liability exposure action well may approach or exceed the costs of involvement in litigation where only his own personal fortune is on the line.

The cases, then, in which error costs from damage suits against the government will be most problematic are those involving asymmetric official interests and large potential liability stakes. Construction of the exceptions to the FTCA must be sensitive to these factors as well as to the deference concerns that shape the likelihood of error. I will return to these factors below.

FREQUENCY, SUIT SELECTION, AND INVESTMENT

The error costs associated with damage suits differ from those associated with other review processes in part as the direct consequence of retroactivity and in part as the consequence of changes in the number and nature of the instances in which review is sought and the means by which it is sought when retroactive relief is available. These mediate process effects increase the likelihood that the review will yield a judicial decision adverse to the government that would not have emerged from the direct review process.

The first process variable is frequency of suit. This is not, of course, an independent variable. Frequency of suit depends upon a number of aspects of the litigation process itself, so conclusions respecting this variable must be drawn with caution. One conclusion, however, seems fairly safe: other things equal, the availability of retroactive relief will increase the number of actions brought. Prospective relief changes litigants' posture for the future; the parties start their next series of activities with greater or lesser prospects as compared with a no-review world. Put differently, the options for contracting around or revising rules for future conduct can significantly alter (reduce) the yield from prospective relief. Retroactive relief does not offer similar opportunities for adjustment and thus does not simply provide a different starting point for the future; it yields a tangible benefit immediately. In this sense, retroactive relief is like found money. Whatever harm it compensates for already has been incurred; seen from the moment that an action for review is (or is not) filed, the opportunity to secure retroactive relief is akin to the prospect of winning a lottery -- apart from the cost of the ticket, you are getting something for nothing.

The analogy to a lottery also explains a second process variable, suit selection. The greater opportunity for gain from retroactive relief alters the mix of complaints about administrative action brought into court. Again holding other things equal, the availability of retroactive relief should induce plaintiffs to file suits with lower probabilities of success than would justify litigation seeking prospective relief.

This can be seen most easily when the role of attorneys as intermediaries is considered. When prospective relief is at issue, the value of the relief is less easily ascertained (especially by those, like the perspective attorney-representative, who are not so familiar as the parties with the context of the dispute and the potential for change associated with particular litigation outcomes) and less quickly (fully) capitalized (as a function of both uncertainty and remoteness in time). Attorneys, thus, are unlikely to undertake representation in prospective relief actions on a contingent basis. The plaintiff must be relatively certain of the outcome and have access to liquid assets, or be able to convince others with such assets of the probability of success, to pursue a suit for prospective relief. Damage actions, on the other hand, can be underwritten by attorneys who are to be paid out of the possible recovery. And, as with lottery tickets, a big potential payoff will induce players to invest the price of the ticket even when the prospect of success is quite low. Of course, risk-neutral players will not invest more than the potential payoff discounted by its probability, but this will suffice for large payoffs to assure takers at probabilities well below those generally required for suits seeking prospective relief.

The general bias toward increasing the proportion of low-probability suits should be especially pronounced in damage suits against the federal government. Extremely large judgments against other defendants run the risk of driving the defendant to bankruptcy, witness the recent saga of asbestos litigation and the Johns Manville Corporation. Not so, however, where suit is against the federal government. The certainty that this defendant will be able to pay a large judgment makes big ticket litigation against the government especially attractive. Given the trade-off between size of potential recovery and probability of success, this will induce filing of suits against the government that have lower probabilities of success than would support suit against another defendant. Returning to the lottery analogy, the bigger the potential prize and the greater the certainty that, if won, it will be paid in full, the less likely success must be in order to justify purchasing a ticket of any given price.

This leads directly to the third process variable, investment in litigation or, in other words, the price of the lottery ticket. The amount that a plaintiff or plaintiff's attorney will invest in litigation varies as a function of several factors: the initial estimate of probable success, the anticipated level of defense expenditures, and the probable payoff if successful (discounted to its present value). Increased payoff value has an unambiguous effect, increasing the amount plaintiffs will spend on litigation. The other factors have a more complex relationship to the plaintiff's expenditure. Increased probability of success both supports greater investment in litigation and, at certain levels, reduces the effect of such investment. To take a polar case, the marginal return from an additional investment in litigation once the probability of success has reached unity is zero -- there is no reason to spend more when there is a one hundred per cent chance of success. For lower probabilities, marginal returns to litigation investment probably follow a bell shaped curve. The level of defense spending affects the ultimate probability of success, increased defense expenditures reducing plaintiff's likelihood of prevailing given any initial prediction of success but with non-constant effects.

As analysis of litigation investment is complex, I will not attempt a full exposition of the subject here. Instead, I will assert and only briefly support the intuition that low probability damage suits against the government will elicit high levels of litigation investment by plaintiffs relative either to non-damage suits against the government or to damage suits against other defendants. If marginal returns to investment increase with the potential payoff and also with probability of success until probability of success at least reaches fifty percent, any factor that increased either the payoff or the probability of success in a low probability damage suit should increase relative investment. As explained above, other things equal, damage suits yield higher payoffs than non-damage suits, and potential recoveries against the government are more valuable than potential recoveries against others. Moreover, again holding other things equal, it is at least arguable that the presence of binding budget constraints on government litigators decreases investment by the government (relative to other parties) in suits for which there is a low probability of plaintiff success. While there may be offsetting factors, it seems likely that some relative excess investment will be associated with plaintiffs pursuing damage suits against the government.

PROCESS VARIABLES AND ERROR COSTS

The direction in which these three process variables move when suit is for damages against the federal government suggests additional reasons for concern over error costs. The increased frequency of suit, standing alone, may be the least troublesome. While it augurs an increase in the absolute number of errors and the absolute level of error costs, it does not presage a disproportionate increase in either. The differences in suit selection and investment in suit, however, suggest a greater escalation of error costs. With more claims of doubtful success filed and these claims more vigorously pressed than they would be against the government in a non-damage context or against a private defendant, more costly judicial errors seem likely. Some increase in plaintiff success on low-probability claims will occur, and this probably will generate increased error costs. The mere fact that a claim is improbable does not necessitate that its grant would be erroneous, measured against the standards of social good suggested earlier. But it does increase the *likelihood* that a grant would be erroneous. At the same time, as low probability is balanced against high payoffs in filing and litigation investment decisions, judicial errors in these low-probability suits also are apt to impose higher costs on the public than would be associated generally with errors in other contexts.

The concerns suggested here about error costs are cognate with concerns expressed by many government officials. Officials declare that litigants and lawyers often are in essence trolling for fat dollars, filing damage suits against the federal government in hopes that one will "get lucky" and land a large (if unexpected) judgment. Some officials voice the concern that fear of a large, unjustified potential damage judgment against the government affects the conduct of government business, and more opine that without strong protection against liability the government could not or would not carry out a variety of its current tasks. Even though potential litigants and their representatives see their actions (and these actions' effects) in a very different light, many will admit that they file claims against the government that stand relatively slight chance of success. They may elaborate the inherent justice of the plaintiffs' position and may find officials' reactions self-serving, yet still not argue that the changes they urge in the content or application of current rules advance social good as judged by political processes and even by individual agreements.

Discussion of effects from tort litigation has been organized around the notion that judicial decisionmaking can err, and indeed some imperfection (or some expectation of decisions that would be found erroneous under the assumed standards of social good) is critical to interest in excepting matters from judicial jurisdiction. But to some extent the effects indicated by changes in process variables can be abstracted from concerns over judicial error and even from concerns over administrators' reactions to potential judicial decisions. If numerous, low probability, high potential yield damage suits are brought against the government, the government incurs substantial cost simply in responding to the suits.

D. Summary

The legislative history of the discretionary function exception, while opaque, points the direction for inquiry by suggesting congressional interest in disparate treatment of three classes of acts. Some acts, presumably those that are based on political judgments discretion over which has not yet been cabined by constraining legal rules, are to be free of judicial supervision. Other acts, readily analogous to ordinary acts of private citizens (for instance, driving an automobile during civilian employment with the government), are to be exposed to judicial regulation in tort suits. The intermediate category is composed of acts that often are subject to judicial review but for which no tort liability was to attach. This division strongly indicates that congressional concern with the behavioral effects of tort litigation dominated interest in use of tort liability to compensate those who are harmed by government employees' actions. Other compensatory schemes might be utilized, including reliance on private contracts, but the use of tort liability outside the category of acts fairly assimilable to private conduct was to be avoided.

By placing beyond the FTCA's purview acts of the type regularly subject to direct judicial supervision as well as acts that properly are exempted from judicial review, Congress signalled its belief that special concerns about the effects of review apply when tort litigation is the vehicle for judicial review . The role of the discretionary function exception -- indeed all the exceptions to the FTCA -- in large measure is to reduce the peculiar ill effects of government tort liability. The problem for analysts of the discretionary function exception is the absence of real guidance on the effects about which the Congress was concerned. The breadth of the clearly stated FTCA exceptions indicates that the effects are not linked solely to revision of major policy decisions. At the same time, congressional acceptance of a substantial slice of state tort law as a mechanism for policing behavior of federal employees engaged in routine activity is at odds with general suspicion of tort law's behavioral effects.

The concerns implicated in the discretionary function exception -- associated specially with review of government decisionmaking through tort suits -- must be derived from the same ground as the traditional doctrine of sovereign immunity. These concerns focus on avoiding erroneous decisions and limiting the ill effects of such decisions. Although there is some basis for belief that courts might reach erroneous decisions -- measured against private and political determinations of joint or social good -- more often in tort suits, the evidence is weak. From the error minimization vantage point, the exception should be tailored to complement the deference accorded administrative decisions on direct review. Concern over reducing error cost, however, supports a broader sphere of judicial deference in tort than in direct review. The retroactive effect of tort liability judgments increases the cost of errors. It also increases the amount of litigation, and, particularly where suit is against the government, it prompts more doubtful suits to be brought and to be pressed more vigorously. The reduction of error cost would be facilitated by precluding suits that may prompt overreaction by federal officials where mechanisms do not exist for effective moderation of this reaction. Such suits present claims with some, but relatively low, probability of success seeking large potential damages from an official act that, made differently, fairly safely could escape liability or other similar constraint.

III. JUDICIAL CONSTRUCTION: THE FUNCTION OF DISCRETION

Putting these theoretical principles into practice requires construction of a test for the discretionary function exception that allows easy application before trial to minimize the number of low- probability suits moving forward, that clearly excludes matters on which strong judicial deference is appropriate, and that reduces the likelihood of adverse (undesirable) administrative reaction to the threat of suit. The judicial treatment of the exception has shown some sensitivity to all these concerns, but the tests that have emerged fall short of the goals suggested in Part II above. This Part examines the tests used by the courts and the issues in which differing judicial judgments have been reached.

A. Judicial Tests: Eight is Enough

From the outset, courts have made plain the difficulty of articulating a test for the discretionary function exception. The first Supreme Court decision to deal with the exception, *Dalehite*, offered no fewer than four possible tests in the majority opinion alone. Other decisions have added at least four more. This section briefly sketches the eight tests and their current postures. Two tests focus on the status of certain actors. Six others focus on the nature of the activity in question, three more narrowly inquiring into specific acts and three looking more generally at the functional category to which the suspect acts might be assigned.

1. Status: Initiating Official

One of the tests suggested implicitly in *Dalehite* looks to the status of the official who initiated the program that gave rise to the claims of injury. *Dalehite*, also known as the Texas City Disaster Case, involved the explosion of unstable fertilizer compound being loaded at Texas City, Texas, for shipment overseas to boost food production following World War II. Justice Reed, writing for the Court in *Dalehite*, noted the conditions that had prompted the "cabinet-level decision to institute the fertilizer export program" and suggested the importance of the high-level initiating officials. 346 U.S. at 19-20, 37-38, 42. The Court's decision in *Dalehite* , however, did not rest on this ground, and subsequent decisions have not relied on the status of officials who initiate the overall programs by which injury is caused to decide the scope of the exclusion.

2. Status: Proximate Decisionmakers

A second status-related test suggested by *Dalehite* has played a larger role. The district court that originally passed on the claims from Henry Dalehite's estate (among others) had found the government negligent in various actions involving the manufacture, labelling, and loading of the fertilizer. The Supreme Court found that various, specific, assertedly negligent actions were products of decisions "all responsibly made at a planning rather than operational level." 346 U.S. at 42. Most of the critical decisions were made by the Army's Field Director of Ammunition Plants and set forth in the Plan he drafted to guide the fertilizer manufacturing process. Other decisions found to be negligent were not specifically set out in the Plan or in similar rules or regulations but were consistent with the existing rules. The Supreme Court's opinion does not make clear whether the level of the decisionmaker, the timing of the decisions (in advance of actual implementation), the generality of the decisions (applicable to all manufacture of fertilizer), or the nature of the decisions was controlling. The operational-level/planning-level test was again endorsed by the Court in Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Rayonier v. United States, 352 U.S. 315 (1957). Lower courts subsequently relied heavily (or, at least, invoked frequently) the operational versus planning-level distinction, often looking to the status of the official whose decision proximately caused the injury at issue. The Supreme Court's *Varig Airlines* decision, however, specifically rejects the notion that the discretionary function exception's application depends on the rank of the official whose acts are challenged. 467 U.S. at 813. Lower court decisions following *Varig*, while still referring to the distinction between decisionmaking at the operational level and decisionmaking at the planning level, have paid less attention to officials' status and more to the nature of their conduct. *See, e.g.*, Henderson v. United States, 784 F.2d 942 (9th Cir. 1986); Drake Towing, Inc., v. Meisner Marine Constr. Co., 765 F.2d 1060 (11th Cir. 1985). Other courts after *Varig* have pointedly rejected the planning-level/operational-level test. *See, e.g.*, Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (D.C. Cir. 1986).

3. Conduct: Discretion and Choice

Perhaps the broadest view of the discretionary function exception is that it precludes liability for any action that required a choice among alternatives by the acting official. Some passages in *Dalehite* emphasize the fact that conscious choice, rather than mere inadvertence, accounted for the actions that led to the Texas City Disaster. Some lower courts have made the existence of discretion on the part of the official whose acts are challenged the sole test for invocation of the exception. *See, e.g.*, Smith v. Johns Manville Corp., 795 F.2d 301 (3d Cir. 1986); Bergmann v. United States, 689 F.2d 789 (8th Cir. 1982); Barton v. United States, 609 F.2d 977 (10th Cir. 1979); National Carriers, Inc., v. United States 755 F.2d 675 (8th Cir. 1985); Butler v. United States, 726 F.2d 1057 (5th Cir. 1984). Other courts have looked to discretion as indispensable, though not necessarily a complete basis for the exclusion, finding the absence of discretionary authority to take the challenged action sufficient to defeat the exception. *See, e.g.*, Drake Towing Co., v. Meisner Marine Constr. Co., 765 F.2d 1060 (11th Cir. 1985). Still other courts have found the exception applicable only if tests, beyond the existence of discretion on the part of the particular official whose acts proximately cause harm, are met, *e.g.*, Thompson v. United States, 592 F.2d 1104 (9th Cir. 1979), or have specifically rejected the existence of individual discretion as relevant, *e.g.*, Collins v. United States, 783 F.2d 1255 (5th Cir. 1986); Jackson v. Kelly, 537 F.2d 735 (10th Cir. 1977). After *Varig Airlines*, courts have placed somewhat less emphasis on the existence or absence of discretion and more on other factors. *Compare* Hylin v. United States, 715 F.2d 1206 (7th Cir. 1983), *vacated and remanded*, 469

U.S. 807 (1984), *with* Hylin v. United States 755 F.2d 551 (7th Cir. 1985) (on remand).

4. Conduct: Timing and Scope

A second conduct-based test generally is phrased in *Dalehite*'s language as distinguishing between operational-level and planning-level activities. This test does not, however, turn on the *level* at which the critical decision in made -- instead of the *rank* of the official, the *nature* of the decision is the crucial factor. Of course, these considerations often are intertwined, and the courts have been notoriously unhelpful in explaining what distinguishes planning from operation or implementation. Rather than detailing the considerations that differentiate these categories of administrative action, the courts generally describe the actions in other terms, for instance speaking of "day-to-day" decisionmaking or "normal" decisions or "ordinary" actions in lieu of "operational-level" actions. The decisions embracing the conduct-oriented form of the planning-operational test nonetheless do seem to turn on three variables. One, which often is specially discussed by courts is treated below as the third conduct-based test. The other two are the timing and scope of the critical decision.

If the harm-causing action is directed by a decision that is more remote in time from the harm and more general in its application, it is relatively likely to be deemed to be the product of a planning level decision, hence immune from liability. For example in Madison v. United States, 679 F.2d 736 (8th Cir. 1982), amended on other grounds *sub nom.* Harrison v. United States, 715 F.2d 1311 (8th Cir. 1983), the court found that the discretionary function exception barred a suit by survivors of persons killed at a government contractor's munitions plant alleging in part government negligence in prescription of standards for the contract. The court noted that the relevant standards were set out in the contractor safety manual promulgated by the Department of Defense. The generality of standards and remoteness from the specific incident both seemed to influence the court. In contrast, in Henderson v. United States, 784 F.2d 942 (9th Cir. 1986), the court of appeals found that the exception did not bar a claim for damages by a trespasser injured while trying to steal copper cable power lines in a remote section of a naval base. The decision not to de-activate the power lines in that area, formerly a missile test site, was not part of a general plan to keep power on-line to such sites but an individual failure to de-energize not conforming to the Navy's general approach to out-of-use sites. *See also* Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982).

5. Conduct: Policymaking

The third test focusing on the particular harm-causing acts also at times is phrased as separating operational from planning decisions but more often appears as an independent test. This test declares that the discretionary function exception shields the government from liability only so far as the triggering act is the authorized exercise of policymaking authority. *See, e.g.*, Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (D.C. Cir.

1986); Begay v. United States, 768 F.2d 1059 (9th Cir. 1985); Miller v. United States, 583 F.2d 857 (6th Cir. 1978); Downs v. United States, 522 F.2d 990 (6th Cir. 1975). Some courts explicitly restrict the ambit of policymaking to decisions that implicate significant choice based on "social, economic, or political" considerations. *E.g.*, Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986); Alabama Elec. Co-op., Inc., v. United States, 769 F.2d 1523 (11th Cir. 1985). The phrasing of this point that is most often quoted is Judge Edward Becker's from Blessing v. United States:

> Statutes, regulations, and discretionary functions, the subject matter of §2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts have no substantive part to play in such decisions Rather, the judiciary confines itself -- or, under laws such as the FTCA's discretionary function exception, is confined -- to adjudication of facts based on discernible objective standards of law. In the context of tort actions . . . these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.

Blessing v. United States, 447 F.Supp. 1160, 1170 (E.D. Pa. 1978) (footnotes omitted). Judge Becker, in a note, contrasted two claims that might be asserted in a test suit complaining of property damage suffered from dam-related flooding. One claim would be that building the dam was improper, flooding naturally resulting from its construction. The other claim would be based on improper methods of construction or operation. Only the first claim, Judge Becker declares, is barred by the FTCA: "If an individual suffered property damage not because too much sand was negligently mixed into the concrete used in constructing the dam, resulting in the dam crumbling and his land being flooded, but simply because the dam was constructed at all, his injury would be the result of policy decisions made by executives and/or legislators whose function it is to weigh competing policy considerations -- economic, social, political, etc. -- and to make decisions based on their evaluation of those relevant considerations." *Id.*, n. 14. This test was increasing in popularity over the decade preceding *Varig Airlines* and appears still to be on the rise, although there is arguable tension between this approach and that taken by the Supreme Court in *Varig*.

6. Function: Regulatory

The three remaining tests divide suits by reference not to the particular harm-causing acts but instead by reference to the function the acts can be said to represent. *Varig Airlines* is central to this approach. The Supreme Court's decision in *Varig* can be read as adopting a (non-exclusive) regulatory functions test. Chief Justice Burger, speaking for the Court, recounted the legislative history's references to insulation of the government from liability for actions taken in its role as regulator of the activities of private persons and

and declared that "whatever else the discretionary function exception may include, it plainly was intended to encompass, the discretionary acts of the Government acting in its role as a regulator." 467 U.S. at 813-14. Burger stated that the *Varig* case presented two types of complaint. One was based on the structure of the Federal Aviation Administration's program for airplane inspection and certification, which largely relied on "spot checks," paper records, and manufacturers' self-scrutiny, and which allegedly was inadequate to assure safety. The other complaint was that the inspection of the particular type of plane involved had not been conducted with sufficient care.

The Supreme Court found both these complaints barred by the discretionary function exception. The first complaint plainly implicates the sort of discretionary policy judgment that would be protected by several of the status or conduct-focused tests. The second complaint, however, arguably states grounds for suit that would not be barred by most other discretionary function tests, as, indeed, the Ninth Circuit held below in *Varig*. *See* S.A. Empresa de Viacas Aereo Grandense v. United States, 692 F.2d 1205 (9th Cir. 1982), *reversed*, 467 U.S. 797 (1984).

The cleanest test that *Varig* might stand for is a broad regulatory functions test: when government acts as a regulator of private conduct, it is exempt from FTCA liability without need for further inquiry into the status of the employee whose actions lead to the harm complained of or into the nature of those particular actions. It is not clear, however, that the Court intended to embrace such a test. Most of the opinion's references to the regulatory activity at issue also suggest that some importance attaches to the fact that the particular conduct at issue was discretionary or involved the exercise of policy judgment. *See* 467 U.S., at 813-14, 819-20. For instance, rejecting the grant of jurisdiction over claims of negligence in the particular spot-check inspections, the Court declares: "The FAA employees who conducted compliance reviews . . . were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the 'spot-check' program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals." 467 U.S., at 820.

Lower court decisions after *Varig* show increased concern with regulatory functions but division over the significance of the functional category. Construction of the discretionary function provision as creating a special "regulatory functions" exception, has been adopted by other courts in the wake of *Varig*. *See* Wendler v. United States, 782 F.2d 853 (10th Cir. 1985); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Proctor v. United States, 781 F.2d 752 (9th Cir.), *cert. denied*, 469 U.S. 1228 (1985). Some of these post-*Varig* decisions have construed the exception as broadly excluding any liability for performance of regulatory functions, even if a government employee violated an established rule, or otherwise acted without due care in performing that function. *See, e.g.*, Cunningham v. United States, *supra*; Hylin

v. United States, *supra* (any discretionary action in regulatory program protected); General Pub. Utils. Corp., v. United States, *supra*. Other decisions have required that substantial policymaking authority accompany the specific regulatory acts at issue. *See, e.g.*, Collins v. United States, 783 F.2d 225 (5th Cir. 1986); McMichael v. United States, 751 F.2d 303 (8th Cir. 1985). It is not clear that the actual applications of these tests fully conform to the rhetorical formula chosen by the court.

7. Function: Governmental

A second functional test asks not whether the offending activity regulates the conduct of private individuals but more generally whether it is part of a particularly *governmental* function. *See, e.g.*, Mitchell v. United States, 787 F.2d 466 (9th Cir. 1986). This test, too, was suggested in *Dalehite*, both in the majority opinion and in the dissent, but it was not clearly developed in that case. The sense of the test, which derives in part from the pre-FTCA law governing municipalities' responsibilities in tort, is that even negligent performance or non-performance of actions that, of themselves, involve no significant discretionary authority will not give rise to liability if that is peculiar to government.

Courts that explicitly have embraced this test generally have combined interpretation of the discretionary function exception with some other source of law, such as negative inference from the FTCA's general grant of jurisdiction (because it provides for government liability when a private actor would be liable in like circumstances, it precludes liability for purely governmental functions) or interpretation of the scope of public duties. *See, e.g.*, Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) (no private analogue to CPSC decisionmaking); Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977) (FAA officials, even when directed by superiors to take certain actions, owe no enforceable duty to public; government air traffic controllers, operating under rules that also govern private air traffic controllers, do owe duty to air travellers). Other courts, not explicitly articulating a government functions test, find actions that would not pass the conduct tests stated by the court nonetheless are covered by the exception when those actions are "inextricably intertwined" with discretionary activities of a sort that seems uniquely governmental, such as law enforcement, civil commitment, or construction of public works. *See, e.g.*, Pennebank v. United States, 779 F.2d 175 (3d Cir. 1985) (municipal sewer project); Abernathy v. United States, 773 F.2d 184 (8th Cir. 1985) (civil commitment); Ostera v. United States, 769 F.2 716, *rehearing denied*, 775 F.2d 304 (11th Cir. 1985) (law enforcement); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (law enforcement); Payton v. United States, 679 F.2d 475 (11th Cir. 1982) (*en banc*) (parole).

Construction of the discretionary function exception as encompassing a government function exclusion seems to have gained some momentum after *Varig Airlines*. The momentum has not, however, moved all courts along the same path. Some decisions have done this through an expanded form of the regulatory function test, *see, e.g.*, Jet Industries, Inc. v. United States, 777 F.2d

303 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 1971 (1986), and other decisions have retained strong requirements for the particular conduct even when closely associated with discretionary activity of a peculiarly governmental nature. *See, e.g:,* Lindsey v. United States, 778 F.2d 1143 (5th Cir. 1985).

The judicial treatment of this exception has a checkered past as well as a checkered present. The Supreme Court initially assumed that peculiarly governmental activities that were insulated from liability under state tort law -- firefighting, for instance -- also were outside the FTCA's scope. One of the claims rejected in *Dalehite* was for negligence in combatting fires after the explosions that were the central focus of that case. *See* 346 U.S., at 43-44. The *Indian Towing* decision two years later, however, specifically rejected analogy to municipal liability and its governmental-proprietary distinction as a predicate for FTCA liability. The four dissenting justices complained that, followed to its logical conclusion, the *Indian Towing* approach would allow liability for peculiarly governmental activities, singling out firefighting as their example of such an activity that should not give rise to tort liability. 350 U.S., at 76 (Reed, Burton, Clark, and Minton, J.J. dissenting). Two years later, in *Rayonier,* the Court approved FTCA liability for exactly this activity. 352 U.S. 315 (1957).

Despite *Indian Towing* and *Rayonier,* the courts have been influenced by references in the legislative history of the Act suggesting congressional intent to abolish distinctions between government and private parties performing essentially identical acts (as with the automobile accident example) but not to allow liability suits to challenge "the propriety of [regulatory decisions or] . . . administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like." Hearings on H.R. 5375 and H.R. 6463 before the House Judiciary Committee, 77th Cong., 2d Sess. 65 (1942) (testimony of Ass't Atty. Gen. Francis Shea). Without often adopting a government functions test, courts often have referred to this language when granting acts carrying out government functions broader insulation from liability.

8. Function: Discretionary (Non-Mandatory)

The final, and (along with the first test) least followed, of the eight tests takes the language of the discretionary function exception literally. It immunizes the government from liability for acts taken in pursuit of an activity that the official or government enterprise is permitted but not required to perform. The broad form of this test would exempt from liability all acts, whether discretionary or not, in furtherance of a non-mandatory government activity. No court has adopted this test. One court, however, has embraced a narrow form of this discretionary function test (which, to avoid confusion, will be labelled the "non-mandatory function" test).

The Tenth Circuit of the U.S. Court of Appeals has held that the exception applies to *acts* that constitute the exercise of discretion in furtherance of *activities* (or functions) that also are discretionary. *See* Weiss v. United States, 787 F.2d 518 (10th Cir. 1986); Jackson v. Kelly, 537 F.2d 735 (10th Cir. 1977) (*en* *banc*). In Weiss v. United States, the court found this test satisfied: NOAA cartographers who did not show an aerial tramway cable (about 150 feet high) on an aeronautical sectional chart were given discretion by the interagency cartographic committee to decide whether to chart obstructions lower than 200 feet; and the cartographic function itself was discretionary. In Jackson v. Kelly, however, the court held that the test was not met: although the government doctor whose acts were in question had exercised discretion, it was not "governmental discretion" of the sort required by the exception because he had a "mandatory duty" to treat the patients involved.

These cases reflect conflation of the discretionary function exception with two other concepts: first, with the duty of care required as an element of any negligence-based cause of action, and, second, with the standards employed to assess the availability of mandamus or until recently to assess the exposure of lower-ranking executive officials to damage liability (both mandamus and damage immunity have relied on a division of ministerial from discretionary acts). Although these concepts are related one to another, they are not wholly coextensive. The court's analysis, hence, might be sharpened by unpacking the different concepts. Were this done, it seems unlikely that the non-mandatory function test would survive.

B. Grading Tests: Caution When Passing on a Curve

The various tests evidence at once considerable judicial sensitivity to the concerns that should inform construction of the discretionary function exception and equally considerable difficulty crafting an appropriate legal rule out of those concerns. The tests all present, to some degree, problems of inconsistency with the FTCA's legislative history and of incompatibility with goals described by theory. This section describes some of the problematic aspects of the test. The problems, although interrelated, are discussed here under three headings: coherence, fidelity, and complexity.

1. Coherence

An obvious problem to those who read judicial opinions about the discretionary function exception long has been the seeming inconsistency of judicial decisions. Judge Becker aptly states (or understates) the problem: "despite the Court's efforts, the Supreme Court's pre-*Varig* decisions seem to have left the meaning of the discretionary function exception somewhat unclear, with the result that lower court decisions . . . do not comprise a particularly coherent body of case law." Blessing v. United States, 447 F. Supp. 1160, 1172 (E.D. Pa. 1978). After citing examples of conflicting decisions, Judge Becker continues: "In part, this confusion may stem from the fact that the Court's planning/operational distinction, instructive as it may be on a theoretical level, can become exceedingly problematic when applied to concrete facts." *Id.*, at 1173.

In fact, the problem is more general than difficulty with the planning/operational distinction. The problem of coherence in this area of law has two complementary aspects. One aspect of the problem is that courts have used at least seven of the eight disparate, sometimes incompatible -- indeed, sometimes mutually exclusive -- tests discussed above to decide the exception's applicability. Consistency in outcomes across an array of very different constructions is implausible if not impossible.

A second aspect of the problem is internal to the various tests. Judge Becker rightly notes that courts have had difficulty discerning what conduct should be characterized as planning and what as operation, an inevitable difficulty given the intrusion of planning judgments into many actions that seem simultaneously to be concerned with implementation of more general, abstract plans. *Blessing, supra,* at 1173-74, n. 19. Similar difficulty attends most of the other tests, including the policymaking test Judge Becker feels constrained to apply in *Blessing*. Policymaking is no more readily segregated from policy implementation than planning is from operation; the cases adopting a policymaking test for the discretionary function exception seem no more consistent than those employing a planning/operation test.

The problem appears in another form in decisions endeavoring to separate governmental functions from other functions performed by government employees. The analytical problem (which, as explained below, is only part of the coherence problem) in the policy/implementation and planning/operation contexts requires division of conduct that combines two features into groups with greater or lesser amounts of the critical feature. In the governmental function cases, the analytical problem is pushed one step back: the first task is describing the critical features that make an activity peculiarly governmental. The government is never the only enterprise to engage in all aspects of a given activity -- firefighting is a private business as well as a publicly-operated one; private security forces largely replicate the activities of public police; private association set standards and, regulate members adherence; even the lighthouse has a private enterprise double -- so that simple analogical tools are of limited utility. Only after identifying the factors that make an enterprise governmental will one encounter the sort of slippery slope problem that frustrates application of the conduct-focused distinctions.

The tests that perhaps are least subject to these analytical difficulties are those that concentrate on the status of official actors. It is easier to rank relative levels and responsibilities of the government actors and to assign importance to particular divisions among the ranks than to separate types of conduct or function. Even though these status considerations still play a role in some decisions, the courts have been moving away from explicit reliance on them. The *Varig Airlines* decision continues, and possibly accelerates, this trend.

The hope many government officials have expressed that the *Varig* decision will increase decisional coherence appears unlikely to be fulfilled. *Varig* undermines the more easily applied status-based tests. It mixes language suggesting different tests. And it expressly recognizes that discretionary functions cases may not all be soluble under a single test. Not surprisingly, courts after *Varig* continue to apply various tests and also to apply individual tests in varying ways. The contribution of *Varig* principally has been increasing the scope of the exception in cases involving regulatory activity. Even here, however, the cases continue to be mixed. *See, e.g.*, Baker v. United States, 55 U.S. Law Week 2648-49 (9th Cir., No. 86-5578, May 18, 1987) (discretionary function exception does not insulate government from liability for negligence in regulating drug company's testing of polio vaccine where negligence was not in the substance of the applicable regulations but in their implementation); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (discretionary function exception does not preclude suit for negligent decision to terminate "imminent danger" order for mine, and for decision not to reclassify mine as one that should be closed, where no substantial policy reason supported rescission order and where failure to reclassify was found to countervane governing regulations); McMichael v. United States, 751 F.2d 303 (8th Cir. 1985) (discretionary function exception does not bar suit alleging negligent failure of Defense Department to supervise safety at contractor's plant where negligence was in implementation of Department's safety regulations).

2. Fidelity

JUDICIAL TESTS AND LEGISLATIVE COUNTER-EXAMPLE

A second problem is fidelity to the legislative intent behind the FTCA. Sketchy as it is, the legislative history does provide some specific examples of activity that was to be included in or excluded from the Act's waiver of sovereign immunity. The judicial efforts to craft comprehensive tests almost invariably focus on a sub-set of these examples, generating interpretations of the discretionary function exception that fit well with those examples but not with others.

Again, Judge Becker's opinion in *Blessing* is useful. Supporting the Third Circuit's adoption of a policymaking conduct test, Judge Becker notes that the legislative history of the exception reveals an intent broadly to shield discretionary policy determinations but to insulate only non-negligent efforts to implement policy. He cites both the first clause in 28 U.S.C. §2680(a) (excepting "[a]ny claim based upon the act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid") and the congressional declaration, in reports accompanying bills that evolved into the FTCA, the "exception intended to preclude . . . suit for damages against the government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." 447 F. Supp., at 1170-1171. Judge Becker further notes the congressional statement that the section is "designed to preclude . . . claim[s] against a regulating agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority." He concludes that these examples demonstrate the intent to exempt only policymaking conduct, either in the form of statues, regulations, or discretionary executive policy choices, and not to exempt the execution of those choices from judicial scrutiny in a tort suit. *Id.*, at 1169-70. A broader exception, after all, would conflict with the requirement that, in the irrigation project example, there be "no negligence on the part of any government agent."

This explanation distinguishes the legislative example that probably was used to illustrate the provision that immediately precedes the discretionary function exception (the application of law exception) in the list of FTCA exceptions, and also distinguishes one illustration of action within the discretionary function exception, from actions not analogous to either of these illustrations. But it ignores other illustrations of the discretionary function exception that appear in the very same paragraph of the same congressional reports and that would not satisfy the policymaking conduct test. The relevant paragraph, quoted earlier, declares that "negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted." The negligent *administration* of blacklisting or freezing powers hardly seems to fit the definition of policymaking conduct.

The congressional reports further associate the discretionary function exception with other exceptions, explaining that each leaves the government exposed to liability for ordinary common law torts: "Thus, [the sections specifically] exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions." What an odd illustration that would be if Congress intended to subject the government to FTCA liability for negligence in all aspects of the administration of its various activities save only the creation of policy! Surely the Congress could have come up with some more apt example of negligent administration had it wanted broadly to create liability for all actions that did not constitute the formulation of general policy. Surely, too, the language of the discretionary function exception seems peculiarly ill-chosen if the intent were to exclude only general policymaking conduct.

The problem of incomplete fidelity to the known indicia of legislative intent is by no means confined to proponent of the policymaking conduct test. All of the tests suffer from this problem to some degree, with the possible exception of the non-exclusive form of the regulatory functions test. The planning-level/operational-level tests (whether focused on status or conduct) and the discretionary conduct test conflict with the same legislative history as the policymaking conduct test. The governmental function test, and even the non-mandatory function test, is at best a strained fit with congressional suggestion that FTCA liability would attach to negligent execution of government activities such as flood control or irrigation projects. The initiating official status test also runs afoul of this suggestion.

LEADING BY EXAMPLE: LEGISLATIVE HISTORY AND THE FIDELITY PROBLEM

In part, the fidelity problem derives from the nature of the legislative history. The materials comprising the history occasionally declare what seem to be goals for the FTCA and for particular provisions such as the discretionary function exception. Yet, to divine the purpose of that provision, the legislative history requires interpreters seriously concerned with congressional intent to construct its meaning by extrapolation and interpolation from illustrations rather than by reconciliation of competing, comprehensive theses of the appropriate ambit for government liability. Courts must decide what the examples stand for and then decide how to link them one to the other in a fashion that allows application of the discretionary function exception to the heterogeneous situations in which it is implicated. This can be done, as in Part II above, by giving cursory attention to the congressional examples and extended consideration to the theoretical linkage, or it can be done by carefully examining the examples and essaying to work out from them to situations not plainly resembling a specific example. Whichever route is taken, however, should produce a test that is not inconsistent with the examples relied on by Congress when it passed the amorphous language of the Act: whatever the language means, it should mesh with the most concrete information about its intended application.

LEGISLATIVE EXAMPLES AND SUGGESTIONS

The legislative history contains four illustrations that indicate what specific conceptions of discretionary functions informed drafting of the FTCA and two general statements that provide less directed addenda. The first is the discussion of public works (irrigation and flood control projects) in connection with the application of law exception. The negative implication of this illustration is that negligent execution of public works projects are actionable even though their designs are not.

Second, regulatory enforcement programs, characterized by broad administrative authority (initially), governed only loosely by statute (the FTC and SEC references) are to be exempted in fairly sweeping fashion from FTCA purview. Allegations of lack of authority, of procedural delict, or of negligent execution of superiors' orders in implementation of these programs, all would seem insufficient to bring a tort claim within the scope of the Act.

Third, other administrative enforcement powers, exercised under somewhat stronger legislative constraints (freezing and blacklisting authority of the Treasury), also are broadly insulated against challenge through tort suits. Assertions of negligent execution or of excess of authority at any level would seem to be unavailing to tort plaintiffs so long as the existence of a general enforcement authority, arguably applicable, was made out.

Finally, the legislative history repeatedly contrasts, on the one hand, claims of wrongdoing in the course of exercising governmental authority and, on the other, the garden variety tort, (not involving any serious government decisionmaking high or low-level, policy- or practice-oriented), which is a basis for tort liability regardless of the program that gives rise to it. This is the automobile collision/negligent driving example. To this list of specific examples, Assistant Attorney General Shea's testimony added two general descriptions of activity he took to be within the compass of the discretionary function exception. These are "the expenditure of Federal funds" and "the execution of a Federal project." He did not elaborate the contours of these exclusions, but described both as the the sort of "discretionary administrative action" that the Act did and should safeguard from scrutiny in damage suits.

ELASTIC PHRASES AND EASY CASES

These illustrations plainly leave much open territory to be charted. They do not explicitly reach wide expanses of federal action -- land management, welfare benefits administration, or much licensing administration, for instance -- even if they seem to suggest the appropriate treatment of these categories implicitly. And the illustrations are worded in a way that guarantees dispute. Take the first illustration, involving "an authorized activity, such as a flood control or irrigation project, where no negligence . . . is shown." The phrasing of this illustration is unfortunate as the notion of an "authorized" project is elastic. At one end, it could be simply the general authority to proceed with a project -- to build a dam on a given river at a generally described location subject to an initial budget constraint. At the other end of the spectrum, authority could require compliance with all the particular legal rules that govern environmental and safety concerns, procedures for approval of pleas and expenditures, employment constraints and so on. The reference to an absence of negligence likewise can be elastic.

At the same time, the illustrations indicate that, whatever one makes of the ambiguous phrases and empty spaces in the Act's legislative history, judicial construction of the discretionary function exception must comprehend at least two disparate classes of suit. Suits that challenge the application of government power to constrain the activities of private parties or to withhold government benefits from them as penalty for past misconduct (the generic categories to which the FTC, SEC, and Treasury examples belong) are outside the Act's scope. These functions should give rise to FTCA liability only at the periphery, as the auto accident example indicates. Suits that arise from public works projects, however, can secure recompense for negligence of government employees in at least the mechanical aspects of constructing or operating a dam or similar facility.

HIGH FIDELITY: DEFERENCE AND THE FIT BETWEEN HISTORY AND THEORY

This division is consistent with the theoretical analysis articulated earlier. Judicial supervision of regulatory functions is likely to generate more errors and higher costs, and produce less benefit, than will review of decisions associated with public works projects.

The relatively low benefit is most easily shown. In the regulatory arena, most decisions implicate complex, polycentric, politically-informed judgments. These rarely are constrained tightly by legislative command --

mandates that the FTC act to prevent "unfair or deceptive trade practices" throughout the American economy or that the FCC allocate use of the radio spectrum in a manner that promotes "the public interest, convenience, and necessity" are not atypical statutory directives -- and there is ample basis for belief that congressional influence is channeled more into selecting the agency jurisdiction to which these authorizations attach, influencing appointment of high-level agency officials, and monitoring agency funding than into articulation of legal standards.

Against this background, courts frequently accord substantial deference to the initial administrative choices on implementation of legislative commands. Although administrative actions produce increasingly strong legal guidelines for application as one descends from the highest-level policymakers to lower-ranking administrators, similar choices are implicated to some significant degree in an extraordinarily wide array of regulatory decisions. Even at the "operational level," many of these decisions continue to receive significant deference from courts. Insofar as courts would defer, a clear exception efficiently reduces litigation without sacrificing the interests of those plaintiffs who will be probable victors in court. Moreover, when regulatory action subject to legal constraints substantially and directly affects a discrete class of persons, identifiable *ex ante*, those almost invariably are accorded some form of direct judicial review, further reducing the benefit of *ex post* tort suits.

ERROR RATE AND THE REGULATORY EXCEPTION

The likely error rate and costs for judicial review of regulatory decisions are less easily shown but more important. Each has two aspects.

First, as to error rate, the insinuation of political concerns into the general run of administrative decisions in the regulatory arena provides ample opportunity for judicial misapprehension of the governing legal rule. Congress usually will not have articulated a clear rule, and the administrative rule, if clearer on its face, often is fleshed out by unwritten rules reflecting shifting concerns about matters such as resource allocation that are not readily reduced to hard-and-fast formulae. Does adoption of a rule declaring propensity for violence to be among the grounds for denial of parole mean that the Parole Board in fact has decided not to release prisoners who have any propensity for violence? Obviously, legislative decisions on funding prisons, the size of prison populations, judicial constraints on confinement conditions (including crowding), and the prevailing political winds will influence interpretation of this rule. There is no readily analogous body of common law decisions that will enable courts to feel comfortable examining these interpretations. If they examine them *ex post* for signs of error -- as when a paroled prisoner murders a witness against him immediately after his release -- even deferentially-inclined courts well may misconstrue the relevant rule.

Further, the sort of polycentric, complex decisions involved in regulatory programs interlock with so many other decisions that the proximate causation issue becomes an analytical nightmare. Hadley v.

Baxendale, 9 Ex. 341, 156, Eng. Rep. 145 (1854), the hoary old chestnut familiar to everyone who has experienced the first year of law school, is illustrative. Was the delay in delivery or the shipper's failure to take precautions (mechanical or contractual) against the interruption of work the proximate cause of his losses? Common law limitations on consequential damages from breach of contract (the principle for which *Hadley* stands) respond to the same instinct that supports restriction of liability for government regulation. The myriad affected actors, engaged in a range of activities, often are better positioned to know the effects on them of various potentialities and to take steps to prevent, limit, or insure against loss.

If the postal exemption of the FTCA is on all fours with Hadley v. Baxendale, the discretionary function exception's general exclusion of liability for regulatory functions is largely analogous. The parties affected by regulatory actions often will be sufficiently numerous, their activities and values sufficiently heterodox, and their options for protecting themselves against loss from the regulatory action sufficiently accessible, that a party other than the government should be found proximately to have caused the harm associated with the regulatory action.

This does not, of course, mean that *every* other party will be so positioned. Take the *Varig Airlines* case, for example. The passengers killed in the crash could, of course, have insured; they could have read extensively on air plane design and safety; and they could have bought higher-priced tickets on a carrier with newer, safer planes. But that does not make them the actors best positioned to avoid the loss. The manufacturers and purchasers of the airplane have more information than passengers on its safety, its design, its use, and its maintenance, and more information than the government on many of these issues as well as more options for risk-minimization.

Pressure to see the government regulator as the proximate cause of harm in this setting comes from the depth of the government's pockets and the certainty of their availability to passengers who were injured or to the estates of passengers who died. The Ninth Circuit's decision in *Varig*, reversed by the Supreme Court, may be a reflection of the same human impulses that have led to expansion of the joint tortfeasor concept with attendant application of the rule on joint and several damage responsibility. These impulses account for the very real concern about errors in this context.

ERROR COSTS AND REGULATORY FUNCTIONS

The concern over error costs from tort-based judicial review of regulatory activity is similarly real. In general, damage suits challenging regulatory activity will be more likely than those in other areas to generate undesirable incentive effects. Much regulatory behavior already is characterized by asymmetric incentives which potential tort litigation will exacerbate. The FDA example referenced earlier is paradigmatic. *See, e.g.*, Gray v. United States, 445 F.Supp. 337 (S.D. Tex. 1978). In some instances the risk of damage suits can be minimized by official action that is overly zealous in protecting health and safety (especially where the duty to comply with regulatory commands is the only penalty visited on parties who are immediately and negatively affected by such action). In many instances, damage suits can be minimized by reduced levels of regulatory activity. This is particularly true where any affirmative action carries a litigation risk: administrative paralysis is simply a special case of asymmetric incentives.

Opening the courthouse door just a crack to damage suits arising from regulatory functions may seem appealing as a means of controlling egregious behavior while deferring to the sort of political judgments or scientific judgments that merit judicial acquiescence. But this effort entails process costs of sufficient magnitude not only to translate back into unfortunate incentive effects but also to be cause for concern in their own right. Virtually any bureaucratic exercise of regulatory authority can be disaggregated into component parts such that one part arguably falls outside the ambit of a narrow regulatory conduct exception, no matter how that more limited exception is defined. So long as an agency rule is not challenged on its face, some operational, legally-constrained behavior will be found to have contributed to the challenged exercise of authority. That will not assure that the "suable" behavior either exceeded the bounds of authority (violated some binding constraint) or had enough causal connection to the asserted harm to provide a basis for liability. It will, however, provide a set of triable issues, a problem taken up in the section immediately following.

ERRORS, ERROR COSTS, AND PUBLIC WORKS

The construction of public works projects stands in contrast to exercise of regulatory authority on all of these counts. First, while judicial review often is available for challenges to politically-linked judgments about such projects, *see, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), there seldom is opportunity for judicial scrutiny of the execution of such projects. Among other reasons, rarely will any plaintiff have standing to sue in this context before an injury has occurred. Whatever benefit attends judicial superintendence of these decisions, hence, is not already provided by means other than tort litigation.

Second, judicial errors are less likely in the public works context, as the decisions subject to review have relatively close private conduct analogues. Although sometimes scientific judgments are involved, more often these cases will present issues of fact and of ordinary judgment without significant policy components being implicated directly.

Third, tort-based review of decisions related to the construction of public works projects will have lower error costs. The incentives associated with public construction projects probably are not asymmetrical, but any asymmetry is apt to be ameliorated rather than exacerbated by potential liability. Construction projects generally have one visible input -- cost -- and many less visible material inputs. Given the strength of the budget constraint generally associated with these projects and the difficulty of monitoring in detail the other inputs, both the government supervisors and the private contractors have, at the margin, incentives to economize even at the expense of some increased risk of quality degradation. Tort liability compensates for this tendency by marginally increasing incentives for risk reduction.

EASY CASES AND HARD TESTS: COURTS AND THE LEGISLATIVE CATEGORIES

The two categories marked out by the legislative history do not exhaust the possibilities. Much administrative activity may not be assimilable to either category. And much may be assigned to one or the other category only on the basis of analysis that surely will not be free from debate. But the division between regulatory functions and public works does provide some guidance to courts.

The division between these categories, however, while congruent with theory, is at odds with the explicit structure of several commonly used judicial tests. The actual *decisions* by courts are more compatible with the distinction of regulatory functions from public works. Many courts seem to recognize this division. While striving to create a unifying construction of the exception, their application of the test often varies in ways that increase fidelity, albeit at the expense of coherence. Thus courts that have adopted conduct tests that emphasize policy-planning requirements still can reach results that appear far more congruent with a regulatory function test. *See, e.g.*, Shuman v. United States, 765 F.2d 283 (1st Cir. 1985) (asbestos-related death of shipyard worker held barred by discretionary function exception; government failure to warn contractors about asbestos hazards reflects discretionary decision to have no policy about asbestos warnings). Other courts, however, resist this trade-off of consistency for accuracy.

3. Complexity

A third problem for many of the tests, especially for the conduct test, is their complexity. Simple as the underlying concept might be, application of the tests often require a trial to ascertain whether the conduct in issue qualifies for exception. *See, e.g.*, Blessing v. United States, *supra*. As the waiver of sovereign immunity (which the exception vitiates) is jurisdictional, this yields the anomaly of courts being unable to decide whether they have jurisdiction over a claim until after trial on the merits is concluded. The fact-dependency of tests such as those concerned with conduct -- which require courts and parties to develop information on the particular actions taken, and the basis for them, and the scope of each government official's actual authority before passing on the discretionary function claim -- also contributes to the incoherence of this body of law.

The problems of complexity and incoherence take on special significance given the concerns that prompt adoption of a discretionary function exception. To avoid the costs attendant to excessive, "trolling" litigation, as well as costs associated with officials' reactions to the threat of litigation, what is needed is a simple, easily administered test. Tests that are not readily administered inflict penalties on all who are subject to them. And uncertainty over outcomes decreases the likelihood that potential adversary parties will compromise rather than litigate. *See* Landes & Posner, *Adjudication as a Private Good,* 8 J. Legal Stud. 235 (1979). A test that decides the discretionary function issue imperfectly at the summary judgment level, hence, may be far more responsive to the FTCA'S baseline concerns than a test that, after trial, perfectly divides cases that should be discussed under the discretionary function exception from those that should not. A test that does not always distinguish properly among cases, that yields unpredictable results, that often requires a trial, fails on three counts.

IV. DISCRETIONARY FUNCTIONS: THE EXCEPTION'S EFFECTS

Although the effects of the discretionary function exception are not easily discerned, given the courts' inability to settle on a single test, certain generalities about the exception's consequences seem plausible. Four observations about the exception are offered below. Conclusions are presented in the final section.

A. *Observations*

First, the very ambiguity of the discretionary function exception at present -- the lack of certainty regarding which test will be applied combined with the protean quality of most of the tests -- makes the exception attractive to government litigators. A respectable contention for the exception can be made out in nearly every case.

The frequency with which the exception is invoked also is increased by the prospect for summary judgment. This may at first blush appear to contradict the statement in Part III, regarding the undue difficulty of securing a decision on summary judgment, above, but in fact merely takes a look at the same information from a different vantage point. While the Supreme Court's *Varig Airlines* decision makes summary judgment in regulatory functions cases somewhat more likely, the prevalence of conduct-oriented tests and of regulatory functions tests that are narrowed by requirements of actual authority or of discretionary conduct limits the degree to which government lawyers can prevail on this ground without trial. Still, other available defenses -- defense on, for instance, no duty of care, no causation, or no negligence grounds -- offer even less probable bases for summary judgment.

Second, while the exception will be invoked often, as presently construed it seems not to exert a significant deterrent effect on litigation against the government. Without a sophisticated empirical study (and probably even with one), the exception's impact on filings against the government must be the object more of surmise then of evidence. But there are two bases for conclusion that the exception now exercises scant dissuasive effect. One is mildly empirical: observation that more than a few suits that seem to raise claims at the core of the discretionary function exception's protected zone have been pursued to judgment, even through the appellate stage. *See, e.g., Varig Airlines, supra;* Baker v. United States, 55 U.S. Law Week 2648-49 (9th Cir., No. 86-5578, May 18, 1987) (negligence in regulating and licensing manufacture of polio vaccine); Proctor v. United States, 781 F.2d 752

(9th Cir.), *cert. denied,* 106 S.Ct. 2918 (1986) (negligence in FAA regulation of airline safety); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986) (negligence in OSHA regulation of chemical plant safety); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (negligent regulation of mine safety); Wendler v. United States, 782 F.2d 853 (10th Cir. 1985) (FAA suspension of pilot's license); Taitt v. United States, 770 F.2d 890 (10th Cir. 1985) (parole); Baxley v. United States, 767 F.2d 1095 (4th Cir. 1985) (FAA failure to promulgate safety regulations for ultralight aircraft); Gabarino v. United States, 666 F.2d 1061 (6th Cir. 1981) (FAA safety regulation of hang gliders); Emch v. United States, 630 F.2d (7th Cir. 1980), *cert. denied,* 450 U.S. 966 (1981) (bank regulation); Gray v. United States, 445 F.Supp. 337 (S.D. Tex. 1978) (drug regulation). The other basis is theoretical as well: the relative propensity of damage plaintiffs to pursue low-probability/high payoff suits against ultra-solvent defendants makes it difficult to deter suit absent an extraordinarily fail-safe defense, and the confusion over application of the exception not only allows plaintiffs some significant prospect of success even in these core cases. Plaintiffs, indeed, prevailed at the court of appeals level in *Varig*, *Baker*, and *Collins* , cases clearly within the core of the exception's intended scope.

This last observation can be restated in terms of the expected returns of litigation and the expected utility of litigation. Uncertainty does not necessarily produce aggregate litigation outcomes more favorable to plaintiffs: if the uncertainty generates increased variation in litigation outcomes that is randomly distributed, windfall losses should offset windfall gains, and litigation still would have the same expected return. The same is true if, in addition to increasing the *number* of departures from the pattern of litigation outcomes, legal uncertainty increases the *magnitude* of departures (increasing the dollar gains and losses). Again, assuming random distribution, expected returns remain unchanged. That would not be the case if departures from the norm systematically fall on one side of the line. This might in fact be the case with FTCA suits, but, as discussed earlier, the point cannot be made with any confidence.

The departure from the standard rational expectations model of litigation introduced by analogizing high-stakes litigation to a lottery, however, illustrates that even with constant expected returns, increased uncertainty can prompt additional suits. At low probabilities, increases in the dispersion of outcomes will increase litigation, ceteris paribus, for the same reason that lotteries with very high payoffs appear to be sustainable with relatively low expected returns (a fact not lost on owners of gambling establishments in Las Vegas, Atlantic City, or elsewhere, or on the treasurers of an increasing number of states). As the spread between the amount bet and amount that might be gained increases, potential players exhibit increased risk preference.

If this behavior is put into the rational expectations framework, and not in terms of foolish optimism, the change in volatility can be seen to contribute to potential litigants-bettors' utility: the disutility of a relatively certain small loss appears less than the expected utility of a large, uncertain gain even when the probability-weighted terms are equal or (within some tolerance) incline against the gain. Hence, as all litigation, FTCA suits included, becomes increasingly a high-stakes affair, increased outcome uncertainty will produce more litigation. The current law on discretionary functions may be more certain than it was before *Varig Airlines* (by no means an easy conclusion to substantiate), but it can hardly be said to be among the clearest bodies of federal law.

Third, the focus of some courts on the delegation of discretion to the officials whose actions are proximately linked to the harm has prompted efforts to reduce specificity in written agency directives. The Department of Justice rightly advises officials at agencies where significant numbers of large-money damage actions are likely that these agencies' exposure to damage liability (or, more accurately, the government's exposure to damage liability) can be reduced by substitution of non-mandatory guidelines for mandatory instructions to subordinates. The corollary of a reduction in clear, written instructions is an increase in informal control or in unchecked administrative discretion. It is not clear that "line" officials at the agencies -- those who are responsible for directing the agencies' day-to-day operations rather than for litigating when those operations give rise to suit -- have been responsive to these suggestions, although possibly they have adjusted to the prospect of federal liability in other ways. To the extent current judicial constructions of the FTCA do induce movement away from clear written directives, or similar adjustment, the movement seems an unfortunate by-product, not a desired result, of the courts' decisions.

Fourth, following from the observation about line officers' uncertain disinterest in formally altering their behavior to reduce the risk of government liability, the current law seems to have surprisingly little discernible effect on most government business. Department of Justice officials, while dismayed by some court decisions, generally approve the courts' handling of discretionary function claims. Other government officials are less cognizant of the sweep of judicial decisions, focusing more narrowly on decision affecting their particular agency, program, or program type. These officials express confidence that the judicial system, despite occasional lapses, will not visit liability on the government on account of the actions of responsibility performing officials. Some opine that even if the courts misinterpret the discretionary function, other FTCA provisions or tort doctrines (such as duty of care principles) will generate results similar to those a well-constructed discretionary function exception will yield. The sample of officials I have interviewed is small and perhaps unrepresentative; conclusions should be drawn from this set of conversations with extreme care and considerable skepticism. Yet, in light of the widespread concern about liability -- among product manufacturers, doctors, municipal officers, news enterprises, and so on -- the relative calm of government officials was striking.

B. Conclusions

The usual end-part to articles and reports presents the author's final thoughts under the singular heading "conclusion." That form seems inapposite here, as two different conclusions are suggested by the material discussed above.

First, the discretionary function exception should be clarified. The use of numerous, incompatible tests for application of this exception plainly signals a problem with current law. The inconsistent results reached by various courts are not products of differences in the underlying state tort law, but instead reflect federal courts' failure to clarify a single provision of federal law. Some ambiguity necessarily accompanies the effort to delineate the appropriate occasions for federal liability, but the current state of the law certainly extends confusion well beyond its natural bounds.

Clarifying the exception will not be easy, but some improvement can be made relatively painlessly. The original meaning of the exception probably best is captured by combining the test focused on policymaking conduct with the exclusion of liability for regulatory functions. This combination will not fully eliminate the problems of unclarity and complexity associated with current interpretation of the exception. This move would, however, both bring the explicit construction of the exception more in line with its intended meaning and better assimilate it with the theoretical framework suggested in Part II. Making the regulatory function element more explicit also should facilitate summary judgment.

The second conclusion addresses implementation of this suggestion. Put simply, the conclusion is that there is little likelihood of accomplishing this change.

In one sense, this may appear paradoxical. After all, no legal impediment to accomplishing this reform by judicial construction exists. The "change" would conform to legislative history for the present statute. Further, it would conform to what most courts now *do* most of the time, although it is less congruent with what courts *say* they are doing. The continued failure of courts to converge on a consensus meaning for the exception, however, makes this solution unlikely.

Legislative restatement would be the more direct route to this clarification, but this too is unlikely. Were the proposed change widely accepted as sensible, a result I will not forejudge, that would not suffice to overcome a critical difficulty: no significant constituency is interested in working to correct the problems presented by current construction of the discretionary function exception. Partly, the lack of interest reflects the fact that, by and large, judicial decisions have not veered badly off the mark. Partly, it is due to the nature of the problems judicial misinterpretations have spawned.

The adverse effects from misinterpretation of the exception may be serious, but they have been channeled into relatively invisible forms. Alteration of government behavior to avoid potential suits, if it has occurred, will rise to public view only in extraordinary circumstances. And even then, the causal link to construction of the exception is inherently problematic.

Increased frequency of suit against the government and increased cost of suit similarly are not likely to be demonstrably connected to decisions on the discretionary function exception. Even if they were, who would object? The increased cost from more, and more expensive, suits is apt to be a trivial part of the federal budget and even of the budget for the Department of Justice, which bears principal responsibility for litigation over federal tort claims. Taxpayers surely would not mobilize to argue against this expenditure or to lobby for a change in the law to make the expenditure unnecessary: so far as their individual interests are implicated, that would be the ultimate trivial pursuit. Public interest groups, whose interests often parallel those of plaintiffs litigating against the government, are similarly unlikely advocates of change.

Of course, those who litigate these claims on the government's behalf would prefer a different provision with greater certainty and less chance of an occasional defeat in a suit that seems to concern the very sort of activity the exception sought to protect. But, for several reasons, government officials also are unlikely to favor a change. As it now stands, the body of judicial decisions interpreting the discretionary function exception, while imperfect, generally reaches results acceptable to the government and is the strongest defense to FTCA liability government litigators now possess. If this provision is open for reexamination given the uncertainty of the political process, officials doubtless will be concerned about the shape a new provision would take. There is, indeed, something quite comfortable about the devils you know. Finally, even if a provision these officials thought better were enacted, some uncertainty inheres in any new statutory language. Alteration of the exception well may reduce uncertainty about its application, but *ex ante* the amendment process increases uncertainty, especially for the short term.

There should be no doubt that the discretionary function exception is in disrepair. Judicial decisions have exacerbated the law's uncertainty and, to a lesser degree, have exposed the government to damage liability in cases that appear clearly assimilable to the congressional examples of activities the exception was intended to insulate. But, if the current discretionary function exception is not perfect, it also, in the language familiar to politicians and bureaucrats, "ain't broke." Getting it fixed now seems a bit much to ask.

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